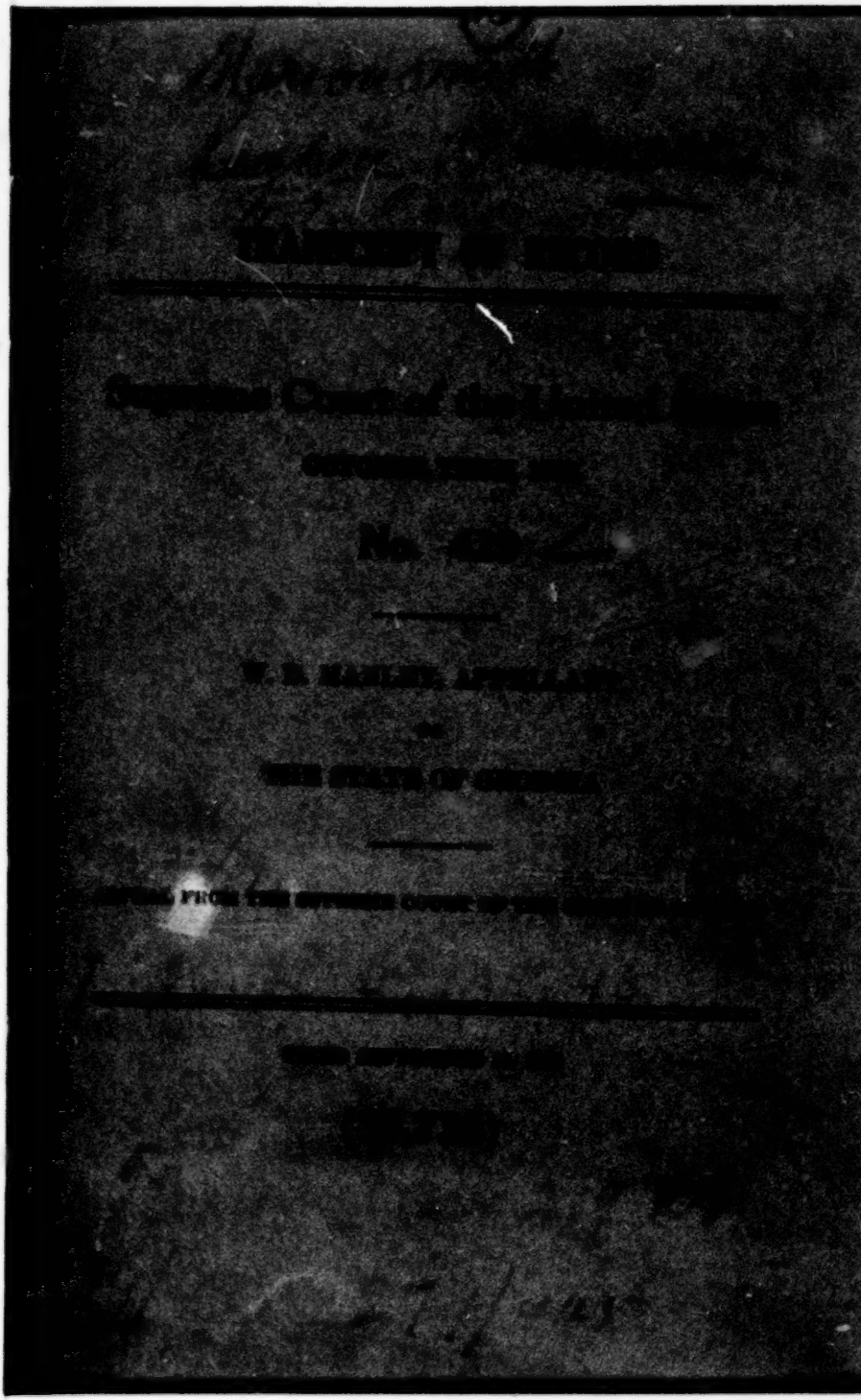

(33,738)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 429

W. D. MANLEY, APPELLANT,

vs.

THE STATE OF GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 24, 1928

In Supreme Court of Georgia

PETITION FOR APPEAL—Filed Aug. 16, 1928

To the Honorable Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia:

The petition of W. D. Manley respectfully shows:

On or about the 11th day of July, 1928, the Supreme Court of the State of Georgia returned a final judgment against your petitioner under a certain indictment brought by the State of Georgia against your petitioner, the said judgment of the Supreme Court of Georgia being a judgment of affirmance of the judgment of the Superior Court of Fulton County, Georgia under said indictment in which petitioner had been found guilty and had been sentenced to a term of penal service as appears from the record in said cause and which judgment of the Supreme Court of the State of Georgia directed that the remittitur be sent to the Superior Court of Fulton County for execution in accordance with the judgment of said Superior Court of Fulton County, all of which will appear by reference to the records and proceedings in said cause. The Supreme Court of the State of Georgia is the highest court of said State in which a decision in said cause could be had.

Your petitioner claims the right to remove said judgment to the Supreme Court of the United States by appeal and to have the same reviewed and considered by that court.

[fol. 2] In the Superior Court of Fulton County there was drawn in question the validity of a statute of the said State of Georgia on the ground of its being repugnant to the Constitution of the United States and the decision of the Superior Court of Fulton County was in favor of the validity of said statute, and the judgment of affirmance of the Supreme Court of the State of Georgia was and is a decision in favor of the validity of the said statute.

The statute of the State of Georgia, the validity of which was thus drawn in question, is, as appears from the record and proceedings in this case, Section 28 of Article 20 of the Act of the General Assembly of the State of Georgia approved August 16, 1919, and commonly known as the Banking Act, which said section of said article of said act pur-

ports to define and create a criminal offense, and the indictment in this cause being a charge of a violation of said section of said article of said act. Petitioner, by demurrer, the same being an adequate and proper way of raising the question under the practice of the courts of the State of Georgia, drew in question the Validity of said statute as repugnant to the 14th Amendment of the Constitution of the United States, all of which more fully appears from the said demurrer filed by your petitioner, together with the bill of exceptions and assignments of error under which the said cause was appealed from the Superior Court of [fol. 3] Fulton County to the Supreme Court of the State of Georgia, all of which your petitioner prays to be read and considered as a part hereof.

Because of the matters herein recited your petitioner claims that under the Act of Congress of January 31, 1928, as amended by the Act of Congress of April 26, 1928, providing that the review which theretofore could have been had in the Supreme Court of the United States on writ of error might thereafter be obtained on an appeal, petitioner has the right to obtain an appeal in this matter inasmuch as prior to said Federal Statutes petitioner could have obtained a writ of error under said circumstances under the Act of Congress approved February 13, 1925.

This petition is accompanied by an assignment of errors.

Wherefore petitioner prays the allowance of an appeal, returnable to the Supreme Court of the United States, and for citation and supersedeas pursuant to the Federal Statutes and the rules of the Supreme Court of the United States, that the errors complained of by your petitioner may be examined and corrected and the said judgment reversed; and your petition will ever prays, etc.

W. D. Manley, by W. T. Colquit, Ben. J. Conyus, Paul S. Ethridge, Arthur G. Powell, Manon Smith, His Attys.

[File endorsement omitted.]

[fol. 4] IN SUPREME COURT OF GEORGIA

No. 6160

W. D. MANLEY, Plaintiff in Error,

v.

THE STATE OF GEORGIA, Defendant in Error

ORDER ALLOWING APPEAL—Filed Aug. 26, 1928

On this the 15th day of August, 1928, the above named W. D. Manley presented his petition for the allowance of an appeal herein to the Supreme Court of the United States and prayed an order allowing the said appeal and that the same operate as a supersedeas.

Now, therefore, this court being the court which rendered the judgment complained of and the highest court in which a decision in said case can be had, and the undersigned being the Chief Justice of the Court, does hereby grant the said petition and allow the said appeal, and does hereby order that the same shall operate as a supersedeas on the said W. D. Manley giving bond in the sum of $500, that he shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, which said bond has this day been approved by me.

Richard B. Russell, Chief Justice of the Supreme Court of Georgia.

[File endorsement omitted.]

[fol. 5] Citation, in usual form, showing service on Geo. M. Napier and John A. Boykin, filed August 16, 1928, omitted in printing.

[fol. 6] IN SUPREME COURT OF GEORGIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Aug. 16, 1928

The above named appellant, concurrently with the filing of his petition for an appeal, files this assignment of errors

Wherefore the appellant prays that the judgment complained of be set aside and reversed.

Walter T. Colquit, Ben J. Conyers, Paul S. Etheridge, Arthur G. Powell, Manon Smith, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 10] IN SUPREME COURT OF GEORGIA

WRIT OF ERROR—Filed Aug. 16, 1928

UNITED STATES OF AMERICA, ss:

[Seal of the U. S. District Court, N. D. Georgia.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Georgia, greeting:

Because in the record, proceedings and judgment in a cause lately pending in the Supreme Court of the State of Georgia being the highest court of the said State in which a decision in the cause could be had, between W. D. Manley, plaintiff in error and the State of Georgia, defendant in error, wherein was drawn in question the validity of a statute of a State, on the ground of its being repugnant to [fol. 11] the Constitution, treaties, or laws of the United States, and the decision was in favor of its validity;[2] it appears that the said W. D. Manley is entitled to have the said judgment reviewed by the Supreme Court of the United States; and he having presented a petition for a writ of error and an assignment of errors to that end;

And we being willing that error, if any hath occurred, should be duly corrected, and full and speedy justice done to the parties aforesaid, do command you that under your seal, distinctly and openly, you send the record, proceedings and judgment aforesaid, with all things concerning

[1] The writ should be directed to the judges of the court of last resort whose judgment is to be reviewed, save where the record has been remitted to and remains in the lower court, in which event the writ may be directed to the judges of the lower court as a means of getting the record. See Atherton v. Fowler, U. S. 143, 160; Shaw Remedy Co. v. Cope, 255 U. S. 197, 202.

[2] If only one of these jurisdictional grounds exists in the case, strike out the other.

the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to correct the error therein, if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 15th day of Aug., in the year of our Lord one thousand nine hundred and twenty-eight.

O. C. Fuller, Clerk of the[4] Dist. Court of the U. S. for the Northern Dist. of Ga.

Allowed by[3] Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsement omitted.]

[fol. 12] IN SUPREME COURT OF GEORGIA

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 16, 1928

To the Clerk of said Court:

The above plaintiff in error, as appellant in the appeal in this case, files this praecipe to indicate to you the portions of the record to be incorporated in the transcript on appeal. You will please make the transcript of the record and transmit the same to the Supreme Court of the United States under your hand and the seal of the Supreme Court of the State of Georgia, duly certifying the same and incorporating therein the following portions of the record:

[3] The writ may be allowed by the chief justice or presiding judge of the state court whose judgment is to be reviewed or a justice of the Supreme Court of the United States.

[4] The writ may be signed and issued by the clerk of the district court of the United States for that district or the clerk of the Supreme Court of the United States.

1. The indictment and plea of not guilty.

2. The defendant's demurrer.

3. The order and judgment of Fulton Superior Court overruling the demurrer and exceptions pendente lite thereto.

4. The verdict of the jury.

5. The sentence of Fulton Superior Court.

6. The bill of exceptions.

7. The judgment of the Supreme Court of the State of [fol. 13] Georgia affirming the judgment of Fulton Superior Court.

8. The opinion rendered by the Supreme Court. By this is meant the majority opinion.

9. The dissenting opinion of Justices Atkinson and Hill.

10. The petition for the allowance of an appeal to the Supreme Court of the United States.

11. The order allowing the same.

12. The citation, and the acknowledgment of service thereon.

13. The assignment of errors on the appeal to the Supreme Court of the United States.

14. The bond on appeal to the Supreme Court of the United States, together with the approval thereof.

15. The writ of error to this court.

16. This praecipe, with the acknowledgment of service thereon.

This the 15th day of August, 1929

Walter T. Colquit, Ben J. Conyers, Paul S. Etheridge, Arthur G. Powell, Manion Smith, Attorneys for W. D. Manley.

Due and legal service of the foregoing præcipe is hereby acknowledged this the 15th day of August, 1928.

The State of Georgia, by Geo. M. Napier, Its Attorney General. John A. Boykin, Solicitor General of the Atlanta Circuit.

[File endorsement omitted.]

[fol. 14] Bond on Appeal for $500.00, approved and filed August 16, 1928, omitted in printing.

[fol. 15] In Superior Court of Fulton County

No. 26735

The State

vs.

W. D. Manley, Paul J. Baker, John D. Russell

Felony (Fraudulent Bank Insolvency F. & T. Bk.)

Bill of Indictment and Plea of not Guilty

True Bill 31st day of August, 1926.

B. L. Bugg, Foreman.

State of Georgia,
County of Fulton:

In the Superior Court of said County

The Grand Jurors selected, chosen and sworn for the County of Fulton, to-wit:

B. L. Bugg, Foreman.
2. Fred J. Cooledge, Jr.
3. George L. Word,
4. V. N. Carroll,
5. Newton S. Thomas,
6. John Ashley Jones,
7. A. W. Malone,

8. Hugh M. Willet,
9. J. N. Eley,
10. W. S. McKimie,
11. W. N. Bagwell,
12. James Sharp,
13. Bryon Souders,
14. —— ——,
15. A. D. Greenfield,
16. J. M. Van Harlingen,
17. Smith Bennett,
18. R. A. Hemphill,
19. G. S. Prior,
20. E. H. LeVert, Sr.
21. Walter J. Wood,
22. George Dowman,
23. —— ——,

in the name and behalf of the citizens of Georgia, charge and accuse W. D. Manley, Paul J. Baker, John D. Russell, with the offense of felony, for that said accused, in the County of Fulton and State of Georgia, on the 12 day of July, 1926, with force and arms, W. D. Manley, being then and there President of the Farmers and Traders Bank, a chartered bank incorporated under the laws of Georgia and W. D. Manley, Paul J. Baker, and John D. Russell being then and there directors of said bank, and the said accused being by law then and there charged with the fair [fol. 16] and legal administration of the business and affairs of the said Farmers & Traders Bank, then and there pending and during the said official charge and responsibility of the said accused the said Farmers & Traders Bank did become fraudulently insolvent, contrary to the laws of said State, the good order, peace and dignity thereof.

John A. Boykin, Sol. Gen'l, Special Presentment.

Plea

W. D. Manley waives copy of indictment, list of witnesses, full panel, formal arraignment, and pleads not guilty.

John A. Boykin, Sol. Gen'l. Little, Powell, Smith & Goldstein, P. S. Etheridge, Cilquitt & Conyers, Def't's Attys.

[fol. 17] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER TO INDICTMENT—Filed Nov. 8, 1926

Comes now the defendant, W. D. Manley, and upon arraignment and before pleading to the indictment demurs thereto as follows:

1. The said indictment is insufficient in law to charge this defendant with any crime and does not charge all the elements necessary to constitute a crime under the law of Ga.

2. Said indictment is insufficient in law to charge this defendant with any crime for the reason that the said indictment is predicated solely on Section 28 of Article 20 of the Act of the General Assembly approved August 16, 1919, and commonly known as the Banking Act, and the said Section is so vague and indefinite and describes the act or acts denominated as a crime in terms so general and indefinite as to make the question of criminality dependent upon the idiosyncrasies of the men who may happen to constitute the court and jury, and in such terms that honest and intelligent men are unable to ascertain what particular act or acts it seeks to condemn, and therefore the said act is unenforceable and null and void.

3. The said indictment is insufficient in law to charge this defendant with any crime for the reason that the said indictment is predicated solely on Section 28 of Article 20 of the Act of the General Assembly approved August 16, 1919 and commonly known as the Banking Act, and the said section aforesaid is unconstitutional, void and of no effect for the following reasons:

[fol. 18] Said section is violative of the 14th Amendment of the Constitution of the United States, and is also violative of Article 1, paragraph 3, of the Constitution of the State of Georgia (Code § 6359), each of which provides that no person shall be deprived of life, liberty or property without due process of law, in that:

(a) The said penal law describes the act or acts denominated as a crime in terms so general and indefinite as

to make the question of criminality dependent upon the idiosyncrasies of the men who may happen to constitute the court and jury, and in such terms that honest and intelligent men are unable to ascertain what particular act or acts it seeks to condemn, and therein denies this defendant the due process of law granted by said constitutional provisions.

(b) The said statute sets up no ascertainable standard of guilt but leaves the standard of guilt to be fixed by the courts and juries rather than by the act itself, and therein deprives this defendant of the due process of law granted by said constitutional provisions.

(c) The said statute, in describing the said act or acts which are made penal, is so vague and indefinite as not to secure to accused persons information as to the nature and cause of the accusations against them, and therein denies to this defendant the due process of law granted by the constitutional provisions aforesaid.

(d) The said statute, in defining how an accused person can clear himself of the conclusion of guilt arising from the insolvency of the bank, requires the said accused person to show (1) that the affairs of the bank were fairly administered (2) that the affairs of the bank were legally admin-
[fol. 19] istered, and (3) that the affairs of the bank had been administered "generally with the same care and diligence that agents receiving commission for their services are required and bound by law to observe," and the test of guilt thus set up creates no definite and ascertainable standard, and is so vague, indefinite and general as to constitute a denial to this defendant of the due process of law granted by the constitutional provisions aforesaid.

4. The said indictment is insufficient in law to charge this defendant with any crime for the reason that the said indictment is predicated solely on Section 28, of Article 20, of the Act of the General Assembly of Georgia, approved August 16th, 1919, and commonly known as the "Banking Act", and the said section aforesaid is unconstitutional, void and of no effect for the following reasons:

Said section is violative of the 14th Amendment of the Constitution of the United States and is also violative of

Article 1, Paragraph 3, of the Constitution of the State of Georgia (Code Section 6359) each of which provides that no person shall be deprived of life, liberty or property without due process of law, in that:

(a) The said statute makes the insolvency of the bank (as defined by said statute) presumptive evidence of fraud on the part of its officers and the said presumption is arbitrary and unreasonable and not a valid exercise of the law making authority of the State of Georgia, and an invasion of the constitutional rights of this defendant under the sections of the Constitution of the State of Georgia and of the United States, hereinbefore pointed out.

(b) The said statute is further violative of said constitutional rights in that the said presumption is further arbi- [fol. 20] trary and unreasonable, and not a valid exercise of the lawmaking authority of the State, for the reason that fraud and guilt are presumed from the insolvency of the bank in which the defendant was an officer and director, and Section 5 of Article 1 of the said Banking Act of 1919 defines insolvency, among other things, as when a bank "cannot meet its liabilities as they become due in the regular course." There is no reasonable connection between the failure of a bank under all circumstances to meet its liabilities when they become due in the regular course, and the presumption or conclusion of guilt and fraud which the statute draws therefrom. To be prepared to meet all of its obligations at all times when due it would be necessary for a bank to maintain a cash reserve equal to 100% of its deposits subject to check on demand, whereas the law of Georgia, in the same act, to-wit, Section 27 of Article 19, provides that a bank need only keep 15% of its demand deposits as a cash reserve, and if a member of the Federal Reserve System may keep even less. The said statute therefore authorizes a bank to lend out 85% of its demand deposits on time loans, and yet provides, in the section under which this indictment is found, that the officers and directors are presumed guilty of fraud in the mismanagement of the bank if more than 15% of the depositors demand their money at one time and if the bank has not maintained more than the cash reserve required by the said act; and therein the said presumption is arbitrary and unreasonable

and violative of the section of the Constitution of Georgia and of the United States aforesaid.

[fol. 21] (c) The said section is further violative of said constitutional provisions in that upon the insolvency of a bank, as defined by the said Banking Act, the defendant, who was president or director of the bank at the time of insolvency, in order to clear himself, is required to show that all of the affairs of said bank have been fairly and legally administered. Under the provisions of said statute the defendant would be convicted and punished if some other person connected with the administration of the bank, had administered some of its affairs unfairly or illegally, without regard to whether the defendant knew thereof or could have known thereof, and even though the same had been done over the protest and objection of the defendant, and even though the same had been done with excusable ignorance on the part of the defendant. The statute therefore makes the defendant criminally responsible for acts of others, where he has had no possibility of controlling or preventing the same, and in doing so, the defendant is thus deprived of his liberty without due process of law. Also, the said statute may make the defendant liable criminally, and subject to imprisonment, if he is unable to show that others connected with the administration of the bank have handled its affairs with due care and diligence, even though he may have had no opportunity to know or control their conduct in these respects.

(d) The said section is further violative of said constitutional provisions in that upon the insolvency of the bank as defined by said Banking Act, the defendant, who was president or director of the bank at the time of insolvency, in order to clear himself is required to show that all of the affairs of said bank have been fairly and legally administered at all times within the statute of limitations, without [fol. 22] regard to the question of whether the defendant was an officer or director at all of said times or not, and would thus require a conviction of the defendant even though the said affairs of the bank had been fairly and legally administered during all the time that he was an officer or director of said bank if they had not been so fairly and legally administered at other times within the

period of limitations when the defendant was not an officer or director and when he had no opportunity to know or control the affairs of the bank.

5. The said indictment is insufficient in law to charge this defendant with any crime for the reason that the said indictment is predicated solely on Section 28, of Article 20, of the Act of the General Assembly of Georgia, approved August 16th, 1919, and commonly known as the "Banking Act," and the said section aforesaid is unconstitutional, void and of no effect for the following reasons:

Said section is violative of Article 1, Paragraph 5, of the Constitution of the State of Georgia, wherein it is provided that every person charged with an offense shall be furnished, on demand, with a copy of the accusation, in that an indictment drawn under the said statute does not name the act or acts which are prohibited by law, and is inadequate to inform a person accused of crime of the nature and cause of the accusation against him. The said statute does not name the act or acts which are prohibited and an indictment following the statute and containing nothing but the statutory allegations, no others being necessary if the statute is constitutional, does not inform the accused of the nature and cause of the accusation against him.

[fol. 23] Wherefore the defendant prays that the said demurrer be sustained and indictment be quashed.

Paul S. Etheridge, Colquitt & Conyers, Little, Powell, Smith & Goldstein.

[File endorsement omitted.]

In Superior Court of Fulton County

Orders Overruling Demurrer

Order

Upon argument this demurrer is overruled.

Nov. 8th, 1926.

G. H. Howard, Judge S. C. A. C.

Order

Upon re-consideration of the demurrer to the indictment filed by W. D. Manley, and upon argument had, it

is ordered and adjudged that said demurrer is overruled on each and every ground thereof.

Nov. 9th, 1926.

G. H. Howard, Judge S. C. A. C.

In Superior Court of Fulton County

Exceptions Pendente Lite—Filed Nov. 11, 1926

Be it remembered that at the November term of said court, to-wit, on the 8th day of Novemlser, 1926, there came on to be tried in said court a criminal case of the State of Georgia v. W. D. Manley, under indictment No. 26735, involving the fraudulent insolvency of the Farmers and [fol. 24] Traders Bank.

Within the time required by law and before pleading to the indictment, the defendant, W. D. Manley, filed a written demurrer to said indictment on the various grounds in said demurrer stated. The Court heard argument thereon and *thereon* on said day and date granted an order and judgment overruling said demurrer.

Later during the same day the judge passed an order which appears of record and for the reason thereon stated re-opening the demurrer for argument again during the same term of the Court, and still before the defendant had pleaded to the indictment, to-wit, on the 9th day of November, 1926, upon the reconsideration of said demurrer and upon argument had, the court, His Honor G. H. Howard, then and there presiding, granted a judgment and order overruling said demurrer on each and every ground thereof, to which judgment and action of the court the defendant, said W. D. Manley, then and there excepted and now excepts pendente lite and says that the court erred in overruling the demurrer on each and every ground thereof.

And now, during said term of the court and within the time allowed by law, comes said W. D. Manley, defendant, through his counsel, and presents this bill of exceptions pendente lite and prays that the same may be signed and certified and recorded as required by law.

Colquitt & Conyers, Etheridge and Etheridge, Little, Powell, Smith & Goldstein, Attys. for Deft., W. D. Manley.

I do certify that the foregoing bill of exceptions pendente lite is true and the clerk of the Superior Court of Fulton County, Ga., is hereby ordered to enter the same of record, as required by law, and to record the same upon the minutes of said court.

This November 11, 1926.

G. H. Howard, Judge Superior Court, Presiding.

[fol. 25] [File endorsement omitted.]

[fol. 26] In Superior Court of Fulton County

Verdict

We, the jury, find the defendant W. D. Manley, guilty as charged in this indictment and fix the penalty at a minimum of not less than nine (9) years and a maximum of not more than ten (10) years in the penitentiary.

11-20-26.

Geo. Greenoe, Foreman.

In Superior Court of Fulton County

Sentence

Whereupon it is ordered and adjudged by the Court that the defendant, W. D. Manley, be taken from the Bar of this court to the Jail of Fulton County, and be there safely kept until a sufficient guard is sent for him from the Georgia Penitentiary and be then delivered to, and be by said guard taken to said Penitentiary, or to such other place as the Governor may direct, where he, the said W. D. Manley, be confined at hard labor for the full term of not less than nine (9) years, and not more than Ten (10) years, to be computed from the date of his delivery.

By the Court 20th Nov., 1926.

G. H. Howard, Judge S. C. A. C., Presiding. John A. Boykin, Sol. Gen'l.

[fol. 27] In Superior Court of Fulton County

Bill of Exceptions and Order Settling Same—Filed July 7, 1927; in Supreme Court July 27, 1927

Be it remembered that heretofore to wit, on the 5th day of November, 1926, and at the November 1926 term in the Superior Court, Fulton County, Georgia, there came on to be heard the case of the State of Georgia vs. W. D. Manley, the same being an indictment for being the President of a Bank which fraudulently failed, and being No. 26735, according to the system of numbering cases in said court.

To the said indictment the said defendant presented his demurrer, which said demurrer was, on November 8th, 1926, overruled. To which said ruling the defendant presented his exceptions pendente lite and the said exceptions pendente lite were duly allowed and certified by an order dated November 11th, 1926, and duly filed and recorded as required by law.

The defendant now excepts to the said order overruling his demurrer and assigns error thereon and assigns error on the said exceptions pendente lite thereto, and defendant says that the said demurrer and each and every ground thereof was well founded in law and should have been sustained and that the court committed error of law in overruling said demurrer and each and every ground thereof.

Thereafter the said case proceeded to trial before a jury and on November 20th, 1926, the jury returned a verdict finding the defendant guilty and fixing his punishment at not less than nine years nor more than ten years imprisonment, and the court entered a sentence in accordance therewith.

[fol. 28] Thereafter to wit, on November 20th, 1926, the defendant filed a motion for new trial which was duly approved by the court and a rule nisi issued thereon, which said rule nisi was regularly continued from time to time and finally came on to be heard on June 25th, 1927. Before the hearing of the said motion for new trial the defendant filed an amendment thereto and the court passed an order allowing said amendment and approving the recitals of fact in the said amendment and in the original motion for new trial. The defendant also before the hearing of the said

motion, filed a brief of the evidence in the case, and the court entered an order approving said brief of evidence and making it a part of the record in the said case.

On the said 25th of June, 1927, the court entered an order and judgment refusing the said motion for new trial and overruling all the grounds thereof, to which said judgment the defendant then and there excepted and now excepts and assigned and now assigns the same as error in law on the part of the court, for the reason that as the said defendant contends each and every ground of said motion for new trial was well founded in law and should have been sustained, and a new trial granted.

The defendant specifies as material to a clear understanding of the errors alleged to have been committed, the following portions of the record, to-wit:

1. The indictment.

2. The defendant's demurrer.

3. The order and judgment of the court overruling the demurrer.

[fol. 29] 4. The defendant's exceptions pendente lite to said judgment overruling said demurrer.

5. The order of the court certifying the said exceptions pendente lite and ordering same recorded.

6. The verdict of the jury.

7. The sentence of the court.

8. The defendant's motion for a new trial and the order and rule issued thereon.

9. The defendant's amendment to his motion for new trial and the order approving the recitals of fact therein.

10. The brief of the evidence and the order of the court approving the brief of the evidence and ordering it filed as part of the record.

11. The order of the court overruling and refusing the motion for new trial.

And now within the time allowed by law, comes the defendant W. D. Manley, and presents this his bill of excep-

tions and prays that the same be signed and certified as required by law that the errors alleged to have been committed may be considered and corrected.

Little, Powell, Smith & Goldstein, P. S. Etheridge, Colquitt & Conyers, Defendant's Attorney.

Post Office address: Atlanta, Georgia.

[fol. 30] I do certify that the foregoing bill of exceptions is true and specifies all of the evidence and specifies all of the record necessary to a clear understanding of the errors alleged to have been committed. The Clerk of this court is ordered to make out a complete copy of such portions of the record as are in this bill of exceptions specified and to certify the same as such and cause the same to be transmitted to the Supreme Court of the State of Georgia that the errors alleged to have been committed can be considered and corrected.

This the 7th day of July 1927.

G. H. Howard, Judge S. C. A. C.

Service of the foregoing bill of exceptions and of the Judge's certificate thereto, after he had signed the same, is hereby acknowledged. Copy received and all further service waived.

John A. Boykin, Solicitor General for the State of Georgia.

[fol. 31] [File endorsement omitted.]

[fol. 32] Certificate to foregoing paper omitted in printing.

[fol. 33] IN SUPREME COURT OF GEORGIA

6160

JUDGMENT

Atlanta, July 11, 1928.

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

W. D. MANLEY

v.

THE STATE

This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur, except Justices Atkinson and Hill who dissent.

[fol. 34] IN SUPREME COURT OF GEORGIA

[Title omitted]

OPINION—July 11, 1928

By the COURT:

1. Section 28 of article 20 of the banking act of 1919 (Acts 1919, pp. 135, 219) does not violate the due-process clauses of the State and Federal constitutions for any of the reasons alleged in the demurrer to the indictment.

2. The indictment is not insufficient in law to charge the defendant with any crime, for the alleged reason that said section of said act, upon which it is based, is void for the reason that it is so vague and indefinite, and describes the act or acts designated as a crime in terms so general and indefinite, as to make the question of criminality depend

upon the idiosyncracies of the court and jury, and in such terms that honest and intelligent men are unable to ascertain what particular act or acts it seeks to condemn.

3. Said section of said act is not violative of article 1, paragraph 5, of the constitution of this State, which provides that every person charged with an offense shall be furnished on demand with a copy of the accusation, in that an indictment under said section does not name the act or acts which are prohibited by law, and is inadequate to inform the person accused of crime of the nature of the accusation against him.

4. The certificate of a public officer of this State shall give sufficient validity or authenticity to any copy or transcript of any record, document, paper of file, or other matter or thing in their respective offices, or pertaining thereto, [fol. 35] to admit the same in evidence in any court of this State.

(a) By the banking act of 1919 the superintendent of banks, upon taking over for liquidation an insolvent bank, is required to cause notice to be published in the newspaper in which the sheriff's advertisements of the county in which the bank is located are published, calling on all persons who have claims against the bank to present the same to him and make sworn proof thereof, filing the same with that officer at the office of the bank.

(b) Where in response to such notice certain Florida banks filed with the superintendent of banks verified claims against the bank in the hands of the superintendent for liquidation, certified copies of such claims are admissible in evidence in any court of this State, when relevant, and such certified copies are primary evidence.

(c) The original verified proofs of claims, so filed with the superintendent, without objection that certified copies thereof are the best evidence, are admissible to establish the fact that the makers were asserting claims against the bank in liquidation; and the trial judge did not err in admitting them for this purpose, they being, when taken in connection with other evidence in the case, relevant upon the issue whether the defendant had fairly administered the affairs of the bank.

5. Courts will not admit in evidence, over objection, against the defendant in a criminal case, the unsworn statements of a person, though they purport to be based on his own knowledge, as evidence of the existence of the facts stated, for the reason that such unsworn statements of a person not called as a witness or subjected to the test of cross-examination are not recognized as having sufficient [fol. 36] probative value to raise an inference that the facts are as stated.

(a) Letters written by bank examiners, deputy bank examiners, receivers, or auditors in charge, or cashiers, or other officers of various Florida banks, to the auditor in charge of the Farmers & Traders Bank, which was in possession of the superintendent for liquidation, in some of which the writers stated that they had letters of advice from the Bankers Trust Company that that company had deposited with the Farmers & Traders Bank various sums claimed by the Florida banks, and that these deposits were of the funds of the Florida banks, and in others of which the writers stated that the records of the Florida banks showed that the Georgia bank was indebted to the Florida banks in various sums for call money, were inadmissible when offered in evidence for the State against the defendant, over his objection that these letters contained unsworn and hearsay statements.

(b) But the illegal admission in evidence of these letters does not require the grant of a new trial, for the reasons: (1) that the trial judge distinctly instructed the jury that he admitted them simply as letters requesting the payment of demands, and not to establish the validity or legality of the demands or claims; (2) because the undisputed evidence shows that the claims of the Florida banks were not treated as liabilities of the Farmers & Traders Bank by the expert witnesses who alone testified to the insolvency of this bank; (3) because under the undisputed evidence, leaving out and wholly disregarding these letters and the evidence relating to these claims, and not treating these claims as liabilities of this bank, the bank was insolvent when taken over by the superintendent of banks for liquidation; and (4) because [fol. 37] the verdict finding the defendant guilty of the

fraudulent insolvency of this bank was required under the law and the evidence.

6. Wholly disregarding the claims of the Florida banks against this bank, the verdict finding the defendant guilty of the fraudulent insolvency of this bank was required by the evidence, and in such a case error in refusing to charge in reference to these claims will not necessitate a new trial. For this reason the refusal of the court to give the requests to charge set out in grounds 92 to 116, inclusive, of the motion for new trial, even if such requests were proper, will not require the grant of a new trial.

7. Where a witness knows a fact both from his personal knowledge and from hearsay, and the issue is one upon which the witness can express an opinion after giving the facts, it is competent for such witness to testify that he knows the facts upon which he bases his opinion both from his personal knowledge and from hearsay.

(a) The insolvency of a bank can be established by the opinion of a witness, provided he gives the facts upon which his opinion is founded; and such testimony being competent, the jury must decide as to its weight and effect, and the credit they will give to it.

(b) Where a witness and others make an appraisal of the assets of an insolvent bank, such witness can testify as to the value put upon various bills receivable of the bank by such appraisers, as one of the facts upon which he bases his sworn opinion at the trial that the bank is insolvent; and such evidence is not hearsay.

8. Where documentary evidence consists of books of account or documents containing multifarious details, expert accountants may summarize their contents and testify to the result of the examination, provided the books and documents are made accessible to the court and parties. Where the purpose of such testimony is not to show the insolvency [fol. 38] of the notes embraced in this appraisal, but to inform the jury what the books and records of the bank and this appraisal showed its financial condition to be, assuming such appraisal to be correct, it is not inadmissible upon the ground that it is hearsay.

9. Where the contents of a writing are not material to the inquiry, but the correctness of the classification embraced therein is relevant, it is permissible for the witness to refer to such document, and to describe it in a general way. The court did not err in admitting the evidence dealt with in the 9th division of the opinion. The purpose of this testimony was not to show that the appraisal had been made, but, assuming it to be made, the object was to show how much of the notes classified therein as good, as doubtful, and as worthless, had been collected; the ultimate object being to show whether the notes appraised as good were good, whether those appraised as doubtful were doubtful, and whether those appraised as worthless were worthless.

10. The court did not err in admitting the evidence dealt with in the 10th division of the opinion. An objection to evidence, not urged at the time it was admitted, and dealt with for the first time in the brief of counsel, will not be considered by this court.

11. The court did not err in refusing to permit a witness sworn for the State to answer the cross-question propounded to him, and dealt with in the 11th division of the opinion.

12. To make a custom or usage good, it must not be contrary to law. Custom can not change the positive law of the State. The defendant was not injured by the refusal of the court to permit the witness for the State to answer the question set out in the 12th division of the opinion. If the practice was legal, proof thereof was not required; and [fol. 39] if the practice was illegal, such practice would not avail the defendant.

13. The instruction dealt with in the 13th division of the opinion was not error for the reason that the court thereby excluded from the jury, as a means of rebutting such presumption, any other facts or circumstances which might be sufficient to rebut the same; the court having expressly, in another part of his charge, instructed the jury otherwise.

14. The court did not err in giving to the jury the instruction dealt with in the 14th division of the opinion.

This instruction was not erroneous, for the reason given in the preceding headnote.

15. The failure of the court to give to the jury the instruction set out in the 82nd ground of the motion for new trial was not error, for the reason that the court did in effect give such instruction.

16. The capital stock of a bank is not a liability that should be taken into account in determining the question of solvency or insolvency of a bank, under section 28, article 20, of the banking act.

(a) The liability of a bank to its stockholders is not an asset that the jury should take into consideration in determining whether the bank is insolvent or not.

(b) Applying these principles, the charge of the court dealt with in the 16th division of the opinion, when fairly construed, is not erroneous.

17. The court did not err in refusing the requests to charge which are dealt with in the 17th division of the opinion, for the reason that these requests were fully and substantially covered by the general charge.

18. The refusal of a court to direct a verdict is never ground for reversal.

19. The opinion of an expert witness is not conclusive upon the jury. Such testimony is intended to aid them in coming to a correct conclusion upon the subject; but the [fol. 40] jury is not bound by such opinion, and can disregard it. The jury may deal with such testimony as they see fit, giving credence to it or not. The verdict was not contrary to the evidence because an expert witness for the State testified that the bank had become insolvent and so remained for a period longer than four years before the return of the indictment. Such evidence would authorize such finding; but there was other evidence from which the deduction could be reasonably drawn that the insolvency of the bank took place within four years next preceding the return of the indictment.

20. The requests to charge, dealt with in the 20th division of the opinion, were covered by the charge as given, and their refusal does not require the grant of a new trial.

21. The court did not err in refusing the request to charge dealt with in the 21st division of the opinion, for the reason that they were not warranted by the evidence.

22. The court did not err in admitting in evidence the documents or schedules referred to in the 22d division of the opinion, for the purpose of informing the jury what notes the State claimed to be good, what notes doubtful, and what notes worthless.

23. The verdict is supported by the evidence.

[fol. 41] W. D. Manley and others were jointly indicted. The indictment charges them with the offense of felony, for that the accused, in the County of Fulton, this State, on July 12, 1926, Manley being president of the Farmers & Traders Bank, a chartered bank incorporated under the laws of this State, and he and the other defendants being directors of said bank, and being charged with the fair and legal administration of its business and affairs, and during their said official charge and responsibility, "said Farmers & Traders Bank did become fraudulently insolvent, contrary to the laws of said State, the good order, peace and dignity thereof." Manley demurred to the indictment, upon grounds which appear in the opinion. The demurrer was overruled, and he assigns error on that ruling. The jury returned a verdict finding the defendant guilty. He moved for a new trial upon the general grounds, and upon many special grounds which appear from the opinion.

According to the evidence, the Farmers & Traders Bank had a capital of $25,000. The defendant was one of its directors from its organization in 1900, and was its president from 1914 to July 12, 1926, when it was placed in the hands of the superintendent of banks. The defendant was president of the Bankers Trust Company. When the Farmers and Traders Bank closed, its books showed that it was solvent, treating its bills receivable and assets as of their face value.

E. B. Lewis was cashier of this bank from June 5, 1925, until it closed. He had twelve years' experience in banking.

A run on the bank began on Saturday before it closed on Monday. When it opened on Monday it had only $7,000 in cash. Before opening on that day the cashier told the defendant that this sum was not sufficient in case there was a run on the bank. The defendant told him to open the bank, that there was nothing wrong, and he would take care of it. [fol. 42] The defendant did not make any arrangements to supply the necessary money. Later on Monday he sent a written notice signed by him and the other directors of the bank, placing the bank in the hands and control of the superintendent of banks, which notice was posted on the door of the bank; and the superintendent of banks took possession. The banks composing the Atlanta Clearing House refused to handle the clearing account of this bank. Its balance was insufficient. The cashier informed the defendant that the bank was insolvent. During a period of about 30 days preceding the closing of the bank, the defendant drew out various amounts approximating $80,000, and placed them with various banks composing the chain of banks of which this bank was one. As these amounts were drawn out he would instruct the cashier to make an entry on the books of this bank, charging each bank with the amount it got. That memorandum or instruction came from the Bankers Trust Company. The defendant drew the checks for these amounts at the Bankers Trust Company, and not at this bank. The bank did not get any security in any shape or form for this withdrawal of $80,000. It did not get notes therefor. The money was from the deposits in the bank. The books of the bank showed $17,000 profit and loss, treating its assets and bills receivable at their face or book value. This wiped out the surplus and impaired the capital of the bank approximately $2,000. There were $103,000 withdrawn and paid on notes negotiated by the Bankers Trust Company with this bank. Most of those notes were renewals. After the bank closed, a committee composed of the cashier and assistant cashier of the bank and three depositors appraised the value of the bills receivable held by this bank. Of the notes representing the $103,000 the committee [fol. 43] appraised as good $28,000, as doubtful $19,000, and as worthless $55,500. This appraisal was unanimous. Lewis, the cashier, testified:

"I think I have personal knowledge of the assets and liabilities of this bank as a whole when it closed. Judging from the assets and liabilities, I would say that it was certainly insolvent within 30 days from the time we had the withdrawal of $90,000, and that it was certainly insolvent when they withdrew that $90,000. My opinion is that it was insolvent the day I took it over the year before."

The Bankers Trust Company borrowed from the National Park Bank $20,000, and the Farmers & Traders Bank furnished about $40,000 of its collateral to secure this loan. This paper matured in 90 days. The cashier of this bank was instructed by the treasurer of the Bankers Trust Company to reshape the collateral and return it to the New York bank with a renewal note, which he did. The collateral securing this note amounted to over $39,000. The cashier then thought the paper was renewed in New York, and made entries on the bank books charging the New York bank with the $20,000. In a few days the cashier was advised that the note was refused renewal in New York, and that the defendant took the collateral over as a personal matter. The cashier then made the proper entries on the bank books, crediting bills receivable with the $20,000, and charging the defendant. In a day or two the defendant instructed the cashier to credit his checking account with $5,000 of that $20,000, for which he held collaterals amounting to $39,000. This bank had a time certificate outstanding in favor of Lodi Trust Company for $9,500. About the time this crash came the defendant instructed the cashier to send him immediately $20,000 of the best collateral the bank had, not to include anything from the Bankers Trust Company. [fol. 44] This the cashier did. After deducting $55,500 out of the above notes amounting to $103,000, $39,000 of notes to secure the transaction with the defendant, $20,000 in notes to secure the Lodi Trust Company, and the $90,000 cash withdrawn and placed with the various chain-member banks, the notes of the bank amounted to $386,000. The committee appraised 52 per cent. of these notes as good, $114,000 of the bills receivable of the bank as worthless (this including $55,000 of the above $103,000 in notes appraised as worthless), and $168,000 of the bills receivable of the bank as doubtful.

R. E. Bentley, an auditor of 21 years' practical experience in banking, as an officer of both small and large banks, testified as follows:

"Have made quite an extensive examination along certain lines of the Farmers & Traders Bank. Have examined the books of the bank and others in connection with this investigation. Have read the minutes of the bank in arriving at my conclusion. From the information in the record it is very clear to me as a banker that the bank had been insolvency dated back as far as 1915, I eliminated from con- that in my opinion this bank was insolvent and that the insolvency dated as far back as 1915, I eliminated from consideration the capital stock or capital and surplus, and considered a reasonable time within which to liquidate the assets of the bank. I excluded undivided profits. In offsetting the liabilities against the assets in the manner in which I said I did it, it is now my opinion, after considering all of those things I have been asked about, that the bank was insolvent as far back as 1915."

Clifford Cable, an accountant and auditor, was employed to examine the affairs of this bank after it went into the hands of the state bank examiner. He was assisted by J. E. Perry, an accountant. They examined the books of the bank. He testified that according to the trial balance on the [fol. 45] books the assets were $575,016.49, and the liabilities, exclusive of capital and surplus, amounted to $531,688. He took down the assets as they were appraised by the committee above referred to. According to this appraisal $114,420.48 of the notes of the bank were worthless, and $168,159.04 were doubtful. "After taking the worthless assets alone, after deducting the assets appraised as worthless by the appraisal committee, * * * it would reduce the assets to such an extent that the capital and surplus would be wiped out, and there would be a deficit of $76,495. * * * After you deduct the assets appraised as doubtful by the committee, of $168,159, that would leave the deficit over and above all the assets and the capital stock of $244,654.59. * * * After that is done, that leaves the liabilities, deducting the capital stock and surplus as shown by the books, the liabilities would be $537,000, and your assets $292,000 and some dollars. That would leave, then, an insolvency of

the difference between $292,000 and $513,000." The bank had deposits subject to check of $211,343.67, deposits in the savings department of $127,714.02, and certificates of deposit amounting to $51,519.69; total $390,577.38. The bank owed other banks $32,010.55. The bank owed the Bankers Trust Company an open account of $1,124.42, and accounts payable $206.43, making a total of $464,918.78. The real estate of the bank consisted of the banking house on Peters street, some property in Florida, a lot on East Fair street, and some property in Crystal City, Texas. They carried this property on the books as of the value of $29,675.62. It was appraised at $20,600. "According to the books, and defining solvency as meaning excess of assets over liabilities other than capital stock and surplus, the books would show that the bank was solvent. * * * Whether that was true would depend upon what the assets were worth that [fol. 46] they carried."

Z. G. McGee was the assistant liquidating agent in charge of this bank under the State banking department. He had had the report of Mr. Cagle and Mr. Perry in his office. According to this report $114,420.48 of the notes of the bank appeared as worthless. He had been trying to collect something out of those notes for about three months; had sent the makers notices; had called on all of those with whom he could get in touch personally; had secured all the information on the makers that he could, relative to what they were worth, and their ability to pay. Do not think offhand I have collected any cash out of those worthless notes in the three months I have had charge. I have set off some, and charged off some. I don't recall any note that I have collected in cash. Those notes that I have gone into, I would consider them just as worthless as they appear there. They are worth nothing, those that I have investigated. I have not collected anything out of any of them except by these offsets. There is a column marked 'Doubtful,' which the records show amounts to $168,159.04. I have collected out of those people, * * * in the three months I have been working and in charge of it, $500, a note. The total collections, counting offsets and cash, would amount to approximately $85,000 out of the good assets of $292,436. I have got $58,000 out of the $292,000 that appears to be good. Out of the $168,000 that appears

to be doubtful I have collected $500, and out of the $114,000 that appears to be worthless I have not collected anything. I remember that particular schedule marked 'Notes Receivable in Bank, Negotiated by the Bankers Trust Company, According to R. E. Lewis.' It seems to be $103,000; good $28,025, doubtful $19,477, and worthless $55,500. I have collected this item of $150 that appears as doubtful. [fol. 47] Out of the worthless column I got nothing, except that Traders Trust Company. I can explain that. There was a $3,000 note. Working with the receiver of that company we sold the collateral that was attached to the trust company's note for $3,000, for about $900. The balance of the note was paid by an offset. We got in cash out of the $103,000, * * * approximately $4,000. That is a part of the $58,000 that I got out of all of it."

The Farmers & Traders Bank did not pay any dividend on its stock for a period of about 10 years before it suspended. The defendant applied to the member banks of the Atlanta Clearing House Association for a loan of $3,000,000, which he stated would be necessary to save his chain of banks. This loan was declined. He then applied to these members for a loan of $100,000, which he said would tide over the affairs of this bank. He submitted to a committee of these banks all of the papers of this bank, amounting to between $320,000 and $325,000. This committee declined to examine any paper under $500, or any automobile paper. After an examination of the collateral offered, the committee declined to recommend to member banks the loan of $100,000.

The cashier of this bank, who was a member of the committee who appraised its assets after it went into the hands of the State banking department, testified that he did not know a number of the makers of the notes appraised, what property they owned, or what tax returns they made; that when a note was called out, if a member of the committee knew the standing and credit of the maker thereof it was accepted. Inquiry was made about the standing of the makers of these notes. This was the method used by the committee in reaching the unanimous appraisal of the assets of this bank.

The defendant was connected with and interested in the following corporations: Phoenix Building Co., Traders

[fol. 48] Trust Co., Georgia Farm Loan Co., United Realty Co., Harper & Weathers Co., The Avalon Co., Bankers Security Co., The Atlanta Builders Inc., Bankers Financing Co., Bankers Guaranty Corporation, Georgia Realty Co., Morningside Park Co., The Amortization Co., W. D. Manley & Co. Inc., and Empire Sales Corporation. The books and papers of all these corporations were kept in the place where the Bankers Trust Company did business. About $300,000 of the notes of these companies were held by this bank. The defendant was president of the Georgia State Bank. In June and July, 1926, between $40,000 and $50,000 of the money of the Farmers & Traders Bank was placed with that bank, for which no security was taken, not even an evidence of debt. This sum was charged on the books of this bank as call money placed with the Georgia State Bank. This sum was a part of the $90,000 call money drawn from this bank and placed with other banks in the Manley chain during the above period. These banks and the amounts placed with them were as follows: Bank of Abbeville, $6,000; Alma State Bank, $5,000; Barney Banking Company, $5,000; Farmers & Merchants Bank, Chipley, $5,000; Madison County Bank, $1,500; Bartow County Bank, $2,000; Bank of Lyerly, $1,000; Bank of Molena, $1,000; Bank of Parrott, $500; Bank of Pineview, $1,000; Plains Bank, $5,000; Bank of Powder Springs, $3,500; Farmers & Merchants Bank of Rebecca, $1,000; Bank of Smithville, $5,000; Bank of Smyrna, $1,000; Farmers & Merchants Bank, Sylvester, $2,067.50; Temple Banking Company, $2,000; Peoples Exchange Bank, Tennille, $500; Georgia State Bank, Bowden, $21,000; Georgia State Bank, Bronwood, $1,000; Georgia State Bank, Cumming, $2,500; Georgia State Bank, Hogansville, $500, Georgia State Bank, Maysville, $2,000 Georgia State Bank, Ocilla, $6,500; Georgia State Bank of Vidalia, $11,500; Bank of Weston, $2,000. Most of these banks failed. [fol. 49] The Bank of Parrott is still running. The Farmers & Merchants Bank of Chipley, the Farmers & Merchants Bank of Rebecca, and the Bank of Weston reopened. No security was taken for these advances to these banks. This bank did not even take notes for them.

In the years 1922, 1923, 1924, 1925, and 1926 the Bankers Trust Company received considerable call money from Florida banks, to be put out on call. This money was handled on the defendant's order. All of this money was deposited with the Farmers & Traders Bank, to the checking account of the Bankers Trust Company, and was drawn out on its checks. The defendant caused the treasurer of the Bankers Trust Company to write each of the Florida banks that the call money sent to the Bankers Trust Company by that bank had been deposited with the Farmers & Traders Bank. The Bankers Trust Company paid the interest on this call money to the Florida banks. The Farmers & Traders Bank had on call $160,000 of money of the Manley chain of banks, and paid on this sum six per cent. interest, when the bank could have procured this money at three and one half or four per cent. From February 11, 1919, to June 11, 1926, the defendant's account in this bank was overdrawn 1,132 times, ranging in sums from $36 to $7,500. The Avalon Company, from July 26, 1923, to May 18, 1925, was overdrawn 33 times, in amounts ranging from $39 to $2,000. From April 6, 1923, to June 29, 1926, the Bankers Security Company was overdrawn 390 times, ranging in amounts from $49 to $1,600. The Bankers Financing Company, from August 31, 1922, to July 12, 1926, was overdrawn 678 times, in amounts ranging from $50 to $2,700. The last entry on the ledger sheet of the bank showed a credit balance to this company of $14,457.05, when the account was closed. The Traders Trust Company from August 16, 1923, to June 21, 1926, was overdrawn 110 times, in amounts ranging from $41 [fol. 50] to $550. This account was closed on June 21, 1926, when this company had a credit balance of $4,299.10. From May 4, 1922, to March 3, 1926, J. R. Smith & Company, a firm composed of J. R. Smith and the defendant, overdrew 360 times, in amounts ranging from $75 to $7,000. The overdraft on March 3, 1926 was $132.50. There were about $1,500,000 of the papers of the Manley corporations in the Manley chain banks. The defendant was the guarantor of between $500,000 and $1,000,000 dollars of this paper. The defendant obtained loans from this bank as follows: January 1920, $16,205; February, $16,776; March, $16,970; April, $16,458; May, $13,278;

June, $13,130; July, $13,247; August, $5,479; September, $10,035; October, $12,457; November, $10,643; December, $11,522; January, 1921, $14,071; February, $12,675; March, $13,185; April, $11,013; May, $9,701; June, $9,848; July, $10,832; August, $13,695; September, $16,493; October, $16,302; November, $17,281; December, $12,364. He had similar loans during each month of 1922, 1923, 1924, and 1925. In the latter year these loans ranged from $2,003 in November, to $14,152 in January. In 1926 the defendant was overdrawn—January, $762; February, $708; March, $2,765; April, $1,629; May, $6,240; June, $3,119. These loans were paid up. The books of the bank showed that the wife of the defendant obtained from it various loans during the period from January, 1920, to March, 1924, ranging in amounts from $5,000 to $7,785. Bankers Trust Company obtained loans during the period from January, 1920, to December 1925, ranging in amounts from $481 to $20,000. These loans were paid. J. R. Smith, vice-president of this bank, and J. R. Smith & Company, during the period from January, 1920, to December, 1923, obtained from this bank various loans ranging in amounts from $174 to $12,770. Georgia Realty Company, during the period from January, 1920, to December, 1925, obtained [fol. 51] from this bank various loans ranging in amounts from $1,130 to $45,675. The Avalon Company, during the period from September, 1920, to December, 1925, obtained from this bank various loans ranging in amount from $3,125 to $12,517. The Bankers Investment Company, during the period from January, 1921, to April, 1922, obtained loans ranging from $3,562 to $17,866. L. R. Adams, an officer and director of the Bankers Trust Company, obtained from this bank, during the period from August, 1922, to December 1925, loans ranging in amount from $2,560 to $6,781. After an overdraft of Harper & Weathers Realty Company was charged to profit and loss from time to time, this bank discounted a paper for $1,000 on which it was an indorser. This bank bought the entire capital stock of Traders Trust Company, amounting to $30,000. It kept this stock from April 14, 1915, to July 10, 1925, and no dividends were paid thereon.

The individual ledger sheets of the defendant in this bank from January 7, 1924, to December 17, 1924, were

missing. Excessive and unsecured loans were made to the president and directors of this bank. Harper-Weathers Realty Company, Georgia Realty Company Inc, the Avalon Company Inc., Consolidated Realty Company Inc., Atlanta Builders Inc., Bankers Financing Company, Traders Trust Company, Georgia Farm Loan Company Inc., and Bankers Security Company were all adjudicated bankrupts in August, 1926. When this bank suspended, the Traders Trust Company owed it $3,000, the Avalon Company $2,330.20, the Bankers Guarantee Corporation $1,432, the Georgia State Bank $4,000 for money borrowed the day this bank suspended, Phoenix Building Company $3,000. These amounts do not include overdrafts. The record discloses that the Farmers & Traders Bank and the Bankers Trust Company were engaged in kiting. This bank was not a [fol. 52] member of the Atlanta Clearing House Association, but for years had had its paper cleared through the Atlanta & Lowry National Bank, and its predecessor. The Atlanta & Lowry National Bank notified this bank that it would no longer clear its paper through the Atlanta Clearing House.

[fol. 53] Hines, J. (After stating the foregoing facts):

1. The defendant was indicted under section 28 of article 20 of the banking act, which declares that "Every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years: Provided, that the defendant in a case arising under this section, may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner." Acts 1919, pp. 135, 219; 8 Park's Code Supp. 1922, § 2281(bb). The defendant demurred to the indictment, upon the ground, among others, that it violates the due-process clauses of the State and Federal constitutions, in that its terms are so vague and indefinite, and describe the acts made criminal in language so general and indefinite, as to make the question of crim-

inality depend upon the idiosyncrasies of the men who may happen to constitute the court and jury; and sets up no ascertainable and fixed standard of guilt. This contention has been decided by this court adversely to the defendant. The above section of the banking act is a substantial reenactment of section 204 of our Penal Code of 1910, which first appeared in our Penal Code of 1833, and which has reappeared in every Code since that date. In Griffin v. State, 142 Ga. 636, this court held that this section of the Penal Code did not violate the due-process clause of the Federal constitution, in that: (a) it abridged the privileges and immunities of citizens of the United States; (b) it deprived the president and directors of a bank of equal [fol. 54] protection of the laws with like officers of other corporations, as to which there is no law providing that insolvency of the corporation shall be deemed fraudulent, and that the president and directors, or other officers, shall be punished; (c) it destroys or abridges the presumption of innocence which the law raises as evidence in behalf of every one charged with crime; (d) it deprives the president and directors of an insolvent chartered bank of the right of presenting their defense to the charge of fraudulent intent; (e) it declares the insolvency of a chartered bank to be fraudulent, and provides that its president and directors shall be punished, even though they had nothing to do with the management of the bank, and though the insolvency was not brought about by their conduct or with their knowledge; or (f) for any other reasons suggested by the defendant's demurrer. It may be said that this court in that case did not deal with the ground that this section of our Penal Code violates the fourteenth amendment to the constitution of the United States, upon the ground that its terms are so general and indefinite as to fix no certain standard of guilt; and that the decision in the Griffin case is not authority for sustaining the constitutionality of section 28, article 20 of the banking act of 1919. In the Griffin case this court distinctly held that this section does not violate the due process clause of our State constitution. As the due process clause of both the State and Federal constitutions are practically identical, the ruling in the Griffin case is in effect a holding that the section cited does not violate the due process clause of the Federal constitution.

In Fordham v. State, 148 Ga. 753, this court followed the ruling in the Griffin case, and held that the section in question "is not violative of the 14th amendment to the constitution of the United States on the ground that it denies to [fol. 55] persons indicted thereunder due process of law or equal protection of the law." In Snead v. State, 165 Ga. 44 (139 S. E. 812), this court was called on to pass upon the constitutionality of the above section of the banking act of 1919, and held that "There is no merit in the ground of demurrer asserting that the provisions of section 28 of article 20 of the banking act of 1919 (Acts 1919, pp. 135, 219) is violative of the fourteenth amendment to the Constitution of the United States." In view of the rulings in the cases just cited, said section of the banking act of 1919 does not violate the due-process clauses of the State and Federal constitutions. If this question were now an open one in this court, we would follow the ruling made in the cases above dealt with. Those decisions ruled that the presumption created by section 204 of the Penal Code, and section 28, article 20, of the banking act of 1919, does not violate due process. Within proper limits the legislature may make proof of specified acts prima facie evidence of guilt of the accused. Such presumption must not be final. It must not be arbitrary or wholly unreasonable, unnatural, or extraordinary. It must bear some reasonable relation to the facts proved. The accused must be allowed an opportunity to make his defense, show all the facts bearing on the issue, and to have the whole case submitted to the jury for decision, after considering all the evidence as well as such presumption. Griffin v. State, supra; Fordham v. State, supra; Kunsberg v. State, 147 Ga. 591; Hawes v. State, 150 Ga. 101. A statute which makes an act penal in terms so vague that men of common intelligence must guess at its meaning, and differ as to its application, violates the first essential of due process of law. The term of a penal statute creating a new offense must be sufficiently explicit as to inform those who are subject to it what acts or con- [fol. 56] duct on their part will render them liable to its penalty. This is a well-recognized requirement under ordinary notions of fair play and the settled rules of law. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86; International Harvester Co. v. Kentucky, 234 U. S. 216, 221; Collins v.

Kentucky, 234 U. S. 634, 638; Fox v. Washington, 236 U. S. 273; American Seeding Machine Co. v. Kentucky, 236 U. S. 660; Miller v. Strahl, 239 U. S. 426; Tedrow v. Lewis, 255 U. S. 98; Kinnane v. Detroit Creamery Co., 255 U. S. 102; Weeds Inc. v. United States, 255 U. S. 109; Connally v. General Construction Co., 269 U. S. 385. When a criminal statute employs language having a technical or other special meaning well-enough known to enable those within its reach to correctly apply it, it does not fall within the condemnation of the above principle. Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502; Omaechevarria v. Idaho, 246 U. S. 343, 348. So when a statute employs words with a well-settled common-law meaning, although it may contain an element of degree in the definition as to which estimates may differ, it is not void for uncertainty. Nash v. United States, 229 U. S. 373, 376. Are the terms of the above section of article 20 of the banking act of 1919, sufficiently plain and explicit as to inform persons of ordinary intelligence what conduct on their part will render them liable to its penalty? Under this statute proof of the insolvency of a bank raises the presumption that such insolvency is fraudulent. This is perfectly plain. It then provides that the defendant in a case arising under this section may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe; and upon such showing the jury shall acquit him. These terms are not uncertain and indefinite. [fol. 57] The affairs of a bank are fairly administered when honestly administered. A person of ordinary intelligence, entrusted with the management of the affairs of a bank, knows when he is fairly and honestly administering these affairs. The affairs of a bank are legally administered when administered in accordance with law. Our statutes make certain acts in the administration of the affairs of banks unlawful. Presidents and directors of banks are chargeable with knowledge of these statutes, and they should acquaint themselves with their terms and requirements. The statute under consideration requires these officers to administer the affairs of the bank in their charge in accordance with these laws. This is perfectly plain. This

presumption places upon these officers the burden of showing that they administered the affairs of the bank with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe. This care and diligence is defined by law. It is "that ordinary care, skill, and diligence required of a bailee for hire." Civil Code, § 3581. All these terms and requirements of the statute are plain and definite; and when a defendant who is charged with a violation of this statute shows that he complied with these requirements, the jury is required to acquit him. In addition, this statute, as construed by this court, permits the accused to rebut the presumption against him, arising from proof of the insolvency of the bank, by showing other facts, such as that the insolvency was caused by an unexpected panic in the country, or by the speculation of some officer or agent for which the accused was in no way responsible, or by any other facts rebutting the presumption of fraudulent conduct on his part. Griffin v. State, supra. The statute by clear and explicit terms fixes standards by which both the guilt and innocence of a defendant can be determined. It follows that this statute does not [fols. 58-85] violate the due-process clauses of the State and Federal constitutions for the reason that its terms are so indefinite and uncertain as not to inform one accused of its infraction with what he has to meet on his trial.

2. It follows necessarily from what has been said that the indictment is not subject to demurrer upon the ground that said section of said act is void for the reason that its terms are so general and indefinite as to make the question of criminality depend upon the idiosyncrasies of the men who happen to constitute the court and jury, and do not enable honest and intelligent men to ascertain what particular act or acts it seeks to condemn.

3. Said section of the banking act of 1919 is not violative of article 1, paragraph 5, of the constitution of this State, which provides that every person charged with an offense shall be furnished on demand with a copy of the accusation, in that the indictment does not name the act or acts which are prohibited by law, and is inadequate to inform the defendant of the nature of the accusation against him. The indictment need not allege the acts which caused the insol-

vency of the bank; and it need not specify the illegal acts upon which the State relies to show that the defendant did not administer the affairs of the bank in a legal manner. Sneed v. State, supra.

Judgment affirmed. All the Justices concur, except Atkinson and Hill, JJ., who dissent.

IN SUPREME COURT OF GEORGIA

DISSENTING OPINION

ATKINSON, J., dissenting:

1. The indictment was drawn under section 28 of article 20 of the banking act approved August 16, 1919 (Acts 1919 pp. 135-219). That section declares: "Every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years; provided, that the defendant in a case arising under this section, may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner." The constitutionality of this provision of the act was raised by demurrer to the indictment. One ground of attack expressed in different forms in several of the grounds of demurrer was that the terms of the statute are so general and indefinite as to make the question of criminality dependent upon the idiosyncrasies of the men who may happen to constitute the court and jury, and are such as fail to show persons to be affected what standard of conduct is intended to be required, and for such reasons [fol. 86] the statute is void as violative of the due process clauses of the State and Federal constitutions. This exact question has been before this court only one time. Snead v. State, 165 Ga. 44, decided by five Justices, holding that the statute was not unconstitutional upon the ground

stated. In Griffin v. State, 142 Ga. 636, Penal Code § 204, being substantially in the same language as section 28 of Article 20 of the act of 1919 supra, was attacked as violative of the due-process clauses of the State and Federal constitutions, upon several specified grounds which did not include the ground of attack made in the case now under consideration—the ground of indefiniteness; and this court held that the statute was not violative of the due-process clauses of the State and Federal constitutions "for any of the reasons" assigned. This was not a ruling that the statute was sufficiently definite to satisfy the constitutions. This ruling was followed in Fordham v. State, 148 Ga. 758 (4) decided February 13, 1919. The original record of file in this court in that case discloses that the attack made on the constitutionality of the law in that case did not make the question as to indefiniteness of the statute, and consequently no such question was decided. Neither was it decided in Kunsberg v. State, 147 Ga. 591.

In the recent case of Cline v. Frink Dairy Co., 274 U. S. 445, 455-458 it was held that the due-process clause of the 14th amendment to the Federal constitution requires a State, in framing criminal statutes, to frame them so "that those to whom they are addressed may know what standard of conduct is intended to be required." Another principle ruled in that case, as embodied in the third division of the opinion, is that if a criminal statute in the first instance sufficiently describes the acts which it intends to punish, and proceeds further to enact provisos which [fol. 87] materially affect its purport and effect, the first must be considered in connection with the provisos; and that if the statute as a whole fails to provide a definite standard of guilt, the statute will be insufficient to comply with the requirements as to due process of law as contained in the 14th amendment to the Federal constitution. That case involved a statute of the State of Colorado, which was held to be unconstitutional, and concerning which it was said: "The Colorado Anti-Trust law denounces conspiracies and combinations of persons and corporations, 1st, to create and carry out restrictions in trade or commerce preventing the full and free pursuit of any lawful business in the State; 2d, to increase or reduce the price of merchan-

dise, products, or commodities; 3d, to prevent competition in the making, transportation, sale, or purchase of commodities or merchandise; 4th, to fix any standard of figures whereby the price shall be controlled or established; 5th, to make or execute any contract or agreement to bind the participants not to sell below a common standard, or to keep the price of the article at a fixed or graded figure, or to establish or settle the price between themselves so as to preclude a free and unrestricted competition among themselves, or to pool, combine, or unite any interest they may have in such business of making, selling, or transporting that the price of the article may be affected. The foregoing language sufficiently describes, for purposes of a criminal statute, the acts which it intends to punish; but the Colorado law does not stop with that; it is accompanied by two provisos which materially affect its purport and effect. They are as follows: 'And all such combinations are hereby declared to be against public policy, unlawful and void; provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the [fol. 88] object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed; provided further, that it shall not be deemed to be unlawful, or within the provisions of this act, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize, or own any interest in any association, firm, or corporation having as its object or purpose the transportation, marketing, or delivering of such commodities; * * *' The effect of the first proviso is that combinations, with the purposes defined in the 1st, 2nd, 3rd, 4th, and 5th paragraphs of § 1, and declared thereby to be unlawful and void, are not to be regarded as unlawful if their purpose shall be to obtain only a reasonable profit in such products or merchandise as can not yield a reasonable profit except by marketing them under the combinations previously condemned. The second is like the first in declaring that it shall not be unlawful or within the condemnatory provisions of the act for persons engaged in the business of selling or manufacturing

commodities of a class that can only be dealt with at a reasonable profit by such previously condemned trust methods, to employ or own interests in an association having as its object the transportation, marketing, or delivering of such commodities at a reasonable profit. • • • Such an exception in the statute leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused. An attempt to enforce the section will be to penalize and punish all combinations in restraint of trade in a commodity when in the judgment of the court and jury they are not necessary to enable those engaged in it to make it reasonably profitable, but not otherwise. • • • To compel defendants to guess [fol. 89] on the peril of an indictment whether one or more of the restrictions of the statute will destroy all profit or reduce it below what would be reasonable, would tax the human ingenuity in much the same way as that which this court refused to allow as a proper standard of criminality in International Harvester Company v. Kentucky, 234 U. S., 216, 232, 233."

The cases cited in support of that decision involved statutes of similar import. They all differ from the section 28 of article 20 of the act of 1919, now under consideration. The first clause of that act declares: "Every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years." Standing alone this clause is sufficiently definite to meet the requirements of the constitution. It is followed immediately by this language: "Provided, that the defendant in a case arising under this section may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner." This latter clause is not to be construed as qualifying or in any manner changing or modifying the substance of the prescribed penal offense declared in the first clause. It leaves the first clause just as it would have been if the proviso had

not been enacted. The words of the proviso go no further than to declare three ways by which a defendant indicted under the first clause "may repel the presumption of fraud," and do not purport to exclude the defendant from urging any other matter that would repel the declared presumption of fraud or disprove any evidence that the [fol. 90] State might introduce for the purpose of sustaining the charge of fraudulent insolvency. This view comports with the construction of this clause of the statute as expressed in Snead v. State, 165 Ga. 44 (4) and Griffin v. State, 142 Ga. 636. Construing the statute as indicated above, it does not violate the due-process clauses of the State and Federal constitutions on the ground of indefiniteness, as charged in the demurrer to the indictment. This ruling amounts to a concurrence in the judgment relatively to the question dealt with in the 2d division, but not in the reasoning expressed in the majority opinion. The words "affairs" as applied to a bank and "fairly" as applied to administration of the affairs of a bank, as those words are employed in the proviso, are indefinite; but as they are contained only in the proviso which states a rule of evidence, and do not modify or vary the definition of the offense as provided for in the first clause, the fact that they are indefinite does not affect the question.

2. The demurrer to the indictment, in several forms attacks as violative of the due-process clauses of the State and Federal constitutions the above-quoted section 28 of article 20 of the act of 1919, on the ground that the statute makes insolvency of the bank as defined in section 5 of article 1 of the said banking act, "presumptive evidence of fraud," whereas insolvency of the bank as defined in the statute has no reasonable relation to the fact of fraud sought to be presumed, and the statute in so declaring is purely arbitrary and opposed to the due-process clauses of the State and Federal constitutions. Section 5 of article 1 of the banking act declares: "A bank shall be deemed to be insolvent, first, when it can not meet its liabilities as they become due in the regular course of business; second, when the actual [fol. 91] cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors; third, when its reserve shall fall under the amount herein required,

and it shall fail to make good such reserve within thirty (30) days after being required to do so by the superintendent of banks." The point is made that there is no reasonable connection between the failure of a bank under all circumstances to meet its liabilities when they become due in the regular course, as provided in the first clause of said section 5 of article 1 of the act of 1919, and the presumption of fraud which the statute purports to draw therefrom. In this connection it is urged: "To be prepared to meet all of its obligations at all times when due, it would be necessary for a bank to maintain a cash reserve equal to 100% of its deposits subject to check on demand, whereas the law of Georgia, in the same act, to wit, section 27 of article 19, provides that a bank need only keep 15% of its demand deposits as a cash reserve, and, if a member of the Federal Reserve System, may keep even less. The said statute therefore authorizes a bank to lend out 85% of its demand deposits on time loans, and yet provides, in the section under which this indictment is found, that the officers and directors are presumed guilty of fraud in the mismanagement of the bank, if more than 15% of the depositors demand their money at one time, and if the bank has not maintained more than the cash reserve required by the said act." Other reasons are urged as a basis for declaring that there is no reasonable relation between insolvency of a bank as defined by the statute, and fraudulent acts of the officers of the bank, on which to base a presumption of fraud from the mere fact of insolvency of the bank; but sufficient has been stated to illustrate the point. This ground of attack is well [fol. 92] taken, and renders that part of the act violative of the dueprocess clauses of the State and Federal constitutions. The statute, in section 28 of article 20, refers to insolvency as referred to in section 5 of article 1. Insolvency as there defined may arise in either one of three specified ways which are designated in the statute. Section 28 does not refer alone to one of the three definitions of insolvency specified in section 5 of article 1, but in terms applies to "every insolvency," meaning "insolvency" as described in any one of three specified ways."

Fraud cannot be presumed from acts which the law expressly authorizes. The law expressly authorizes banks to incur debt by receiving money on deposit and lending it out,

except the amount required to be kept in reserve as provided in Section 27 of article 19 of the said banking act. The money received on deposit may be payable immediately on the check or draft of the depositor. The loans made by the bank to others may be payable at future dates. If a bank thus receiving deposits lends out all its money in regular course of business, except the amount required to be kept as its reserve, it could not pay all its depositors on demand if they should demand payment at the same time. Yet in these circumstances the failure to pay all the depositors would amount to "insolvency" under the first clause of the definition of insolvency as embraced in section 5 of article 1, and raise a presumption of fraud under section 28 of article 20, notwithstanding every loan made by the bank was perfectly good and would be paid in full at maturity. In transactions of the character mentioned the bank would have been acting within its usual banking business and in the exercise of its powers as conferred by law, and there should be no reasonable relation between its acts, or so-called "insolvency," and fraud. The scheme of the act is to draw a presumption of fraud from proof of facts which [fol. 93] the statute expressly authorizes. This is wholly unreasonable. Lawfulness of the acts in lending out deposits to the extent authorized is incompatible with "reasonable relation" between inability to pay "on demand" and fraud—the ultimate fact should be presumed. The opinion in Griffin v. State, 142 Ga. 636 (4) (83 S. E. 540, L. R. A. 1915 C, 716, Ann. Cas. 1916 C, 80), quoted approvingly from 37 Central Law Journal, 147, as follows: "The penal statutes are supposed to prevent fradulent banking. They are not intended to force all banks to keep all deposits in the vault ready for the depositor upon call. Statutes regulating banking expressly permit the loaning of deposits by requiring the bank to keep on hand a reserve of only 15 to 20 per cent. of their deposits. Does the legislature permit banks to loan 80 to 90 per cent. of deposits, and at the same time fix a heavy penalty for not always having the same money on hand to pay out on demand?" It was said in that case "that, within the meaning of Penal Code (1910) §204 [substantially the same as section 28 of article 20 of the act of 1919], a bank is not insolvent if its entire property and assets are sufficient to discharge its liabilities by process

of liquidation, even though it may not be able to pay its debts immediately as they become due, or to pay its depositors on demand; and that in this statute there is no difference in the meaning of the word 'insolvency' as applied to a chartered bank and the meaning of the word as applied to the financial condition of an individual." Under the definition of "insolvency" as employed in the Penal Code, §204, it was held in effect that there was reasonable relation between "insolvency" so defined of a bank and fraud, and that the law was not violative of the due-process clause of the constitutions for the several reasons assigned. It would not have been so held if the "insolvency" referred to in the statute did not mean just what it was [fol. 94] construed to mean. It was said in the opinion: "With certain limitations, the legislature may enact that when specified facts have been proved, they shall, even in a criminal case, be prima facie evidence of the guilt of the accused, and shift the burden of proof. On this power there are limitations, the principal one of which is that the fact or facts which will raise the presumption and shift the burden of proof must have some fair relation to, or material connection with, the main fact as to which the presumption is raised. The inference or presumption from the facts proved must not be merely arbitrary, or wholly unreasonable, unnatural, or extraordinary, but must bear some reasonable relation to the facts proved."

That decision was followed in Fordham v. State, 148 Ga. 758 (4), where, however, it was stated: "The decision of McFarland v. American Sugar Refining Co., 241 U. S. 79 (36 Sup. Ct. 498, 60 L. ed. 899), dealt with a statute which was construed differently from the construction placed upon Penal Code §204 by this court in Griffin v. State, supra; and while, on the construction placed upon the different statutes, the results were not the same, there was no conflict of principle in the rulings in the two cases." After the decisions in the Griffin and Fordham cases the banking law (Acts 1919, p. 135) was enacted. Section 5 of article I, as noted above, made a new definition of insolvency as applied to a bank comprehended by that law, which, as hereinbefore indicated, differed from the definition of insolvency as defined and applied in the Griffin and Fordham cases. Under this

new definition as stated in the first clause of that section, there is no such relation between such insolvency and fraud as would authorize the statute to declare the insolvency presumptively fraudulent. In McFarland v. American Sugar Refining Co., 241 U. S. 79, a statute of the State of Louisiana declared that "any person engaged in the busi-[fol. 95] ness of refining sugar within this State, who shall systematically pay in Louisiana a less price for sugar than he pays in any other State, shall be prima facie presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction thereof shall be subject to" a prescribed fine and other penalties. It was held that the statute did not create a valid presumption, and that the statute was void as violative of the equal-protection and due-process clauses of the Federal constitution. It was said in the opinion: "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be purely arbitrary mandate.' Mobile, Jackson & Kansas City R. R. v. Turnipseed, 219 U. S. 35, 43. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it and that therefore the plaintiff should be prima facie presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed." Though the statutes are different, the principle there applied also applies to the Geor-[fols. 96-98] gia statute involved in this case. The result of the change of the definition of insolvency as stated in

Griffin v. State, supra, so as to make "insolvency" include the matter contained in the first clause of section 5 of article 1 of the act of 1919, supra, is to affect section 28 of article 20, which condemns "every insolvency" of a bank, and raises a presumption of fraud on proof of "insolvency" as defined in the act, without more, and to render section 28 violative of the due-process clauses of the State and Federal constitutions.

3. Numerous grounds of the motion for a new trial relate to the admission of certain letters from banks in Florida, with reference to alleged claims by the Florida banks against the Farmers and Traders Bank for certain call-money demands. The court erred in the admission of this evidence over the objection that it was hearsay and irrelevant. Owens v. Grove, 145 Ga. 287 (6); Carrie v. Carnes, 145 Ga. 184 (6); Smith v. State, 147 Ga. 689; Aripeka Saw Mills v. Georgia Supply Co., 143 Ga. 210; Hixon v. Bryan, 75 Ga. 392; National Council v. Van Giesen, 20 Ga. App. 211; Johnson County Savings Bank v. Richardson, 9 Ga. App. 466. The error in admitting this evidence was not harmless for the reasons stated in the fifth division of the majority opinion.

[fol. 99] Mr. Justice Hill concurs in this dissent.

[fol. 100] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 101] In Supreme Court of the United States

Appellant's Statement of Points on Which He Intends to Rely and of the Parts of the Record Which He Thinks Necessary for Consideration Thereof—Filed Sept. 15, 1928

The points upon which appellant relies are that the portions of a statute enacted by the Legislature of the State of Georgia creating a statutory crime (and the presumption of guilt provided for therein) for the violation of which appellant was indicted, convicted and sentenced are illegal

and unconstitutional; in that the said statute creating said crime together with the presumption of guilt as provided for therein each contravene and are in violation of the 14th Amendment of the Constitution of the United States. Appellant's grounds and reasons for said contention are set out in a demurrer to the indictment and also in the assignment of error filed with this appeal and each of the points or grounds as therein set out are relied upon; and are not specifically set out here as both said demurrer and assignment of error are parts of the record brought to this Court and are herein specified as parts of the record to be printed; and reference thereto is asked the same as if they were here repeated in full.

The parts of the record which appellant thinks necessary for consideration of the points relied upon are as follows:

Application for appeal, allowance thereof and acknowledgement of service; (Record pages 1-5).

[fols. 102 & 103] Assignment of error and formal parts of the record with reference to appeal: (Record pages 9-14).

Indictment: (Record pages 15-16).

Demurrer to indictment and order of trial court overruling the demurrer and exceptions pendente lite filed with reference thereto: (Record pages 17-25).

Verdict and sentence: (Record page 26).

Bill of Exceptions, together with certificate carrying case to Supreme Court of the State of Georgia: (Record pages 27-33).

Decisions of the Supreme Court of the State of Georgia and statement of case as set out therein: (Record pages 33-52).

Part of the opinion of majority of Supreme Court of the State of Georgia dealing with question of constitutionality of the criminal act in question: (Record pages 53-58).

Dissenting opinion of the Supreme Court of the State of Georgia dealing with constitutionality of act in question: (Record pages 85-96).

Respectfully submitted.

Arthur G. Powell, Marion Smith, Paul S. Ethridge, Walter T. Colquitt, Ben J. Conyers, Attorneys for Appellant.

Service of the foregoing is hereby acknowledged, copy received and all other and further service and notice waived. This 13 day of September 1928.

Geo. M. Napier, Atty. Gen'l of Ga.; John A. Boykin, Solicitor General; T. R. Gress, Asst. Atty. Gen'l, Attorneys for Appellee.

[fol. 104] [File endorsement omitted.]

Endorsed on cover: File No. 33,738. Georgia Supreme Court. Term No. 49. W. D. Manley, Appellant, vs. The State of Georgia. Filed Sept. 10th, 1928. File No. 33,738.

4. In various grounds of his motion for new trial the defendant asserts that the court erred in admitting in evidence, over his objections, proofs of claims of various Florida banks against the Farmers & Traders Bank, filed with the State superintendent of banks after the latter bank was taken in charge by him on July 12, 1926, for liquidation, each of these claims being verified by an affidavit by some officer of the bank making the claim. Each of these proofs set out that Farmers & Traders Bank owed the claimant bank a given amount of call money, subject to withdrawal on demand, prior to July 12, 1926. By the banking act the superintendent, upon taking over for liquidation an insolvent bank, is required to cause notice to be given by advertisement in the newspaper in which are published the sheriff's advertisements of the county in which the bank is located, and in any other newspaper when he may deem it necessary or advisable, once a week for four weeks, calling on all persons who have claims against the bank to present them to him and make sworn proof, filing them with him at the office of the bank, and within a time to be specified in the notice, not less than ninety days from the date of the first publication of the notice. A copy of this notice is required to be mailed to all persons whose names appear as creditors upon the books of the bank. Acts 1919, pp. 135,158; 8 Park's Code Supp. 1922, § 2268(m). These proofs of claims objected to were papers of file in the office of the department of banking. The certificate of any public officer of this State shall give sufficient validity or authenticity to any copy or transcript of any record, document, paper of file, or other matter or thing in their respective offices, or pertaining thereto, to admit the same in evidence in any court of this State. Civil Code, § 5798. There was no objection upon the ground that certified copies of the proofs of claims were the best evidence. The State was not undertaking to introduce the testimony of the persons who verified these proofs of claims, or what appeared upon the books of these banks. It was offering the records appearing in the office of the banking department. The mistake of the plaintiff in error consists in the assumption that these proofs of claims are the personal testimony of the bank officers who verified them. As such records certified copies thereof were admissible. Such rec-

ords are not hearsay. They are not the testimony of witnesses with whom the defendant has to be confronted. They do not purport to set forth the contents of the books of the Florida banks. If there had been objection upon the ground that certified copies of these records thereof were primary evidence, another question would have been made. These documents were admissible to establish the fact that these banks were asserting claims against the Farmers & Traders Bank, although they may have been insufficient to establish the validity of such claims; and this evidence, when taken in connection with other evidence showing the history and origin of these claims, was relevant in throwing some light on the issue whether the defendant had fairly administered the affairs of this bank. For this reason the court did not err in admitting these records over the objections urged. Shivers v. State, 53 Ga. 149.

5. In forty-seven grounds of his motion for new motion for new trial the defendant assigns error upon the admission, over his objections, of various letters written, after the Farmers & Traders Bank had been taken over by the superintendent of banks for liquidation, by bank examiners, deputy bank examiners, receivers, or auditors in charge, or by cashiers or other officers of various Florida banks, to J. T. Perry, auditor in charge of the Farmers & Traders Bank under the superintendent of banks; and of the replies by Perry. Some of these letters stated that the writers had letters of advice from P. J. Baker, treasurer of the Bankers Trust Company, stating that the Bankers Trust Company had deposited with the Farmers & Traders Bank various sums claimed by the Florida banks, and that these deposits were the funds of the Florida banks. Others stated that records of the Florida banks showed that the Georgia bank was indebted to the Florida banks in various amounts. The reply letters by Perry stated that the records of the Farmers & Traders Bank showed no indebtedness to the Florida banks. To the admission of these letters the defendant objected upon the grounds that he urged to the admission of the proofs of claims of the Florida banks dealt with in the foregoing division, and he moved to rule out each of these letters upon the same grounds. Courts will not admit against a defendant in a criminal case

the unsworn statements of a person, though they purport to be based on his own knowledge, as evidence of the existence of the facts stated. The reason on which this rule is based is that the unsworn statement of a person not called as a witness or subjected to the test of cross-examination is not recognized as having sufficient probative value to raise an inference that the facts are as stated. Statements otherwise objected as hearsay do not become competent because they are made in a judicial proceeding, or because they are contained in records or in letters on file in some department of government, in the absence of some statute making them admissible. 22 C. J. 207; Hickson v. Bryan, 75 Ga. 382; Aripeka Saw Mills v. Georgia Supply Co., 143 Ga. 210; Owen v. Groves, 145 Ga. 287 (6). These letters contained statements that the books of the Florida banks showed that the Farmers & Traders Bank owed these banks certain sums of call money, or that funds of these banks had been deposited by the Bankers Trust Company in the Farmers & Traders Bank. These statements were not sworn to, and for this reason were hearsay as to the defendant in this case. The production of the books of these banks, with identification, would not have been suffcient to entitle them to admission to establish the indebtedness of the Georgia bank to the Florida banks. These books would have had to be accompanied by the oath of the persons who made the entries, or the oath of some person who knew the entries to be correct. Southern Home &c. Asso. v. Butler, 111 Ga. 826; Dougan v. Dunham, 115 Ga. 1012.

But we do not think that the erroneous admission in evidence of these letters requires the grant of a new trial. We can not agree with the contention of able counsel for the defendant that this evidence was prejudicial to him. In our opinion their admission was harmless, for several reasons. In the first place the trial judge distinctly instructed the jury that he admitted them simply as letters requesting payment of demands, and not to establish the validity of legality of the demand or claim. With this instruction jurors of average intelligence could not treat these letters as establishing liabilities against this bank, and as tending to establish its insolvency. In the second place, the undisputed evidence shows that these claims of the Florida banks were not treated as liabilities of the

Farmers & Traders Bank by the expert witnesses who testified to the insolvency of this bank; and that, leaving out and wholly disregarding the evidence relating to these claims, and not treating them as liabilities, this bank was insolvent when taken over by the superintendent of banks for liquidation. In the third place, in view of all the evidence, the finding that this bank was insolvent is required. This being so, and the evidence further showing that the defendant was the president and a director of this bank and the dominating and controlling manager of its affairs, the law cast upon him the burden of showing that the affairs of the bank were fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are bound by law to observe. The evidence introduced by the State does not show such administration of the affairs of this bank by the defendant. On the contrary, this evidence tends to affirmatively show that he did not so administer its affairs. For instance, his checking account was often overdrawn during each of the six months preceding the closing of the doors of this bank. In May of that year his overdraft amounted to $6,240. During June of that year his overdraft amounted to $3,119. During the period from Feb. 11, 1919 to June 9, 1926, the defendants' account was overdrawn 1,132 times. It does not appear that these overdrafts were authorized by the board of directors of this bank. Without such authority the defendant committed a misdemeanor in making these overdrafts. 8 Park's Code Supp. 1922, § 2281 (s); Michie's Penal Code, § 211 (19). This bank during the years 1920 to 1925, inclusive, made loans to the defendant in excess of 20 per cent of its capital and unimpaired surplus. In January, 1925, it loaned to the defendant $14,152. During the period of thirty days prior to its suspension of business, the defendant procured this bank to make loans of call money to various other banks, members of a chain of banks of which this bank was one, some of which were in excess of 20 per cent of its capital and unimpaired surplus. Such excessive loans are expressly prohibited by statute. Acts 1919, p. 196; Acts 1922, pp. 63, 68; 14 Park's Code Supp., 1926, §2289(m); Michie's Code, § 2366(159). The making of such loans was not a fair and legal administration of the affairs of the bank. Some of these loans ex-

ceeded ten per cent. of the capital of the bank, and were not secured by good collateral or other ample security. Acts 1919, pp. 135, 196; 3 Park's Code Supp. 1922, §2280(m).

The defendant procured this bank to purchase $103,000 of the notes of the Bankers Trust Company; and that Company received that sum from this bank for that paper. Some of these notes were renewals. Some of them were the paper of corporations in which the defendant was interested. He knew that some of this paper was insolvent. $55,500 of these papers were found to be insolvent. On the day this bank closed its doors and went into the hands of the superintendent of banks, the defendant procured this bank to make to another bank of which he was president a loan of $4,000, when this bank was in distress for funds to meet its obligations. There are many other facts in the record which show mismanagement of this bank. The defendant introduced no evidence, and made no statement. In these circumstances, and taking into consideration the presumption arising from proof of its insolvency, a finding that the insolvency of this bank was fraudulent was required. For these reasons, the illegal admission of these letters does not require the grant of a new trial.

6. Separately, and as to each of the Florida banks the defendant in writing requested the court to instruct the jury that the evidence was not sufficient to show a legal indebtedness to the Florida banks, and that the claimed indebtedness to such banks, as to which evidence had been offered, should not be considered by the jury in passing on the solvency or insolvency of the Farmers & Traders Bank. The court refused these requests. Nowhere in the general charge did the court give to the jury any instruction whatever on this subject. In grounds 92 to 116 inclusive of his motion for new trial the defendant assigns error on the refusal of the requested instructions. The liability of the Farmers & Traders Bank on these claims of the Florida banks is not free from doubt; but conceding that this bank is not liable on these claims, and that the court should have instructed the jury as a matter of law that it was not so liable, we do not think that the refusal to give to the jury the instructions embodied in these requests requires the grant of a new trial, for the reasons given in the

foregoing division. If the treatment of these claims as liabilities of this bank were necessary to establish its insolvency, and if the court as a matter of law was authorized to instruct the jury that they were not liabilities of this bank, then these instructions should have been given; but as the evidence establishes the insolvency of the bank without considering these claims as liabilities against it, and as the guilt of the accused is clearly proved, the failure of the court to give these instructions does not require the grant of a new trial. In Stephens v. Crawford, 1 Ga. 574, it was ruled: "This court will not send a cause back for a rehearing because of the admission of illegal testimony, if, wholly irrespective of that testimony, there was plainly and obviously testimony sufficient to justify the finding." In Arrington v. Cherry, 10 Ga. 429(4), this court said: "In ordinary cases, notwithstanding a misdirection, if the court see that justice has been done, and that a new trial ought to produce the same result, the verdict will not be disturbed." In Myrick v. Hicks, 15 Ga. 155, this court said: "A new trial will not be granted, if the verdict of the jury was right, although the charge of the court may have been wrong." In Hager v. State, 71 Ga. 164, it was ruled: "The verdict was required by the evidence, and in such cases, even if there be error in the charge, it will not necessitate a new trial." In Griffin v. State, 86 Ga. 257 (4), it was held that an erroneous charge did not require the grant of a new trial, where the verdict was demanded by the evidence. In Toler v. State, 107 Ga. 682, the court made this ruling: "While the failure of the court, upon a criminal trial in which the evidence against the accused is entirely circumstantial, to instruct the jury concerning the rule applicable to evidence of this character would, in a close or doubtful case, be cause for a new trial, such failure will not require another trial when the guilt of the accused is clearly and convincingly proved, and the charge as to the amount and character of proof requisite to a lawful conviction is such as to leave no room for doubt that the verdict would have been the same even if the court had in terms stated to the jury that, in order to warrant a verdict of guilty, the evidence must not only be consistent with the guilt of the accused, but inconsistent with

every other reasonable hypothesis." See Leonard v. State, 110 Ga. 291; Gore v. State, 162 Ga. 267 (3).

7. In ground 72 of his motion for new trial the defendant excepts to the ruling permitting R. E. Lewis, a witness sworn in behalf of the State, to testify, over his objections, as follows: "As to the value of those assets, as far as I know there is no change. At the time the appraisal was made the total was $103,000; and we appraised as good $28,000, we appraised as doubtful $19,000, and we appraised as worthless $55,500." The witness referred to $103,000 of notes negotiated with the Farmers & Traders Bank by the Bankers Trust Company, and found among the assets of the former bank at the time it suspended business. The reference to an appraisal was to one which B. T. Morris, W. C. Smith, W. A. Arnold, and the witness made of said notes. Morris and Smith were not sworn as witnesses. The defendant objected to the admission of said evidence, upon the grounds, (a) that it was not competent for this witness to testify as to what other appraisers had done; (b) that the matter referred to was res inter alios acta; (c) that it was hearsay. The court overruled the objections and admitted the testimony, and the defendant assigns error. We can not agree with learned counsel for the defendant that this evidence is the rankest hearsay. The issue involved was the solvency or insolvency of these notes. The solvency or insolvency of a party can be established by the opinion of a witness, provided the witness gives the facts upon which his opinion is founded. Such testimony being competent, the jury must decide as to its just weight and effect, and to what extent they will give credit to it. Crawford v. Andrews, 6 Ga. 244; Riggins v. Brown, 12 Ga. 271, 273; Moore v. Dozier, 128 Ga. 90 (4); Kirkman v. Ashford, 145 Ga. 452 (5), 457; Cabaniss v. State, 8 Ga. App. 129 (17). It clearly would have been incompetent for this witness to have testified that others had appraised $28,000 of these notes as good, $19,000 as doubtful, and $55,500 as worthless. This would have been hearsay. But we can not see how it was hearsay for him to testify that a committee of which he was a member had appraised these notes after the bank had suspended business and the superintendent of banks had taken possession

of it for liquidation. This was in no sense hearsay testimony, if the witness of his own knowledge knew that this appraisment was made and how the notes were appraised. He gave the method by which this committee made this appraisement and the facts upon which the appraisal was based. He gave this procedure as showing his means of knowledge of the character of the paper appraised; and we see no good reason why this appraisal could not be shown as one of the facts upon which he based his opinion, when sworn as a witness for the State, that the bank was insolvent. He gave other reasons to support his opinion that the bank was insolvent. These facts may not have been conclusive or strongly persuasive of the correctness of the opinion; but, as we have seen, the weight to be given to his opinion was a matter to be passed upon by the jury. We can see no good reason why this witness could not state that this appraisal had been made, not to show the solvency or insolvency of the paper appraised, but as one of the facts upon which he based his opinion touching their solvency or insolvency. Where a witness knows a fact both from his personal knowledge and from hearsay, and the issue is one upon which the witness can express an opinion after giving the facts, it is competent for such witness to testify that he knows the fact upon which he bases his opinion, both from personal knowledge and from hearsay. Atlanta &c. Railway v. McManus, 1 Ga. App. 502 (2); Bitting v. State, 165 Ga. 55 (4). But if the admission of this evidence was erroneous, we would not grant a new trial in this case, for the reason that the other evidence introduced by the State establishes the insolvency of this bank at the time of its suspension, the practical correctness of this appraisal with which we have been dealing, and the dominating management of the affairs of the bank by the defendant; and it wholly fails to rebut the presumption of fraudulent insolvency which the law raises against the defendant.

8. In ground 77 the defendant assigns error upon the ruling permitting one Cagle, who was sworn as a witness in behalf of the State, to testify, over his objection, as follows: "I took down the assets that they appraised as worthless [referring to the appraisement of the assets of

the Farmers & Traders Bank, said to have been made by Lewis, Morris, Smith, and Arnold]. According to that appraisal that amounted to $114,420.48. They appraised as doubtful assets of $168,159.04." The defendant objected to the admission of this evidence, upon the grounds, (a) that it was the hearsay report of what the appraisers did, and (b) that the defendant could not be bound by what some appraisers determined in this way. The ruling the court made in this matter was as follows: "I think he can state the sum total of the appraisement, if he was present; but as to what appraisement they put on it, I do not think he could testify to that. I think you can ask if he put the figures down, the sum total. Go ahead and just state the sum total, if you made the figures and put that down." Cagle was an expert accountant employed by the State banking department to investigate the affairs of this bank and make a report thereon to the department. The superintendent of banks is required, when he takes possession of a bank for liquidation, to make an inventory of the assets thereof, in triplicate. Acts 1919, pp. 135, 157; 8 Park's Code Supp. 1922, § 2268(1). Such an inventory consists in a list of the assets of the bank, with their estimated value. It is inferable from the evidence that the appraisal to which reference is made in this ground was made by a committee appointed by the State bank examiner, with the assistance of this auditor, for the purpose of supplying the inventory required by this provision of the banking act. However, this may be, we do not think that this evidence was inadmissible for the reasons alleged. This witness took part in the making of this appraisal. He made the list of the notes appraised, and put down the value of each note as fixed by the appraisers. The purpose of his testimony was not to show the insolvency of these notes. He was sworn to inform the jury what the books and records of this bank and such appraisement showed its financial condition to be, assuming such appraisement to be correct, and what other voluminous records and facts showed the financial condition of the bank to be. In other words, his testimony was offered to show from this appraisal, assuming it to be correct when taken with other voluminous facts and records appearing in the evidence, whether this bank was insolvent. The hearsay rule does not preclude a witness from

stating what certain unsworn statements show, and, assuming them to be true, what they prove. The rule seems to be that where the documentary evidence consists of books of account or documents containing multifarious details, expert accountants may summarize their contents and testify as to the result of the examination, provided the books and documents are made accessible to the court and parties. Sasser v. Sasser, 73 Ga. 275 (5); Henderson v. Central Railroad, 73 Ga. 718 (2); Central Railroad v. Wolff, 74 Ga. 664 (2); Merchants National Bank v. Vandiver, 104 Ga. 165; Cabaniss v. State, 8 Ga. App. 129 (14); 22 C. J. 218, § 182, 14. When the purpose for which this evidence was offered is taken into consideration, its admission was not erroneous.

9. In ground 78 the defendant excepts to the ruling permitting one McGee, a witness sworn in behalf of the State, to testify, over his objections, as follows: "According to this record [referring to the report of the appraisers, Lewis, Morris, Smith, and Arnold, of the assets of the Farmers & Traders Bank], $114,420.80 of these notes appeared as worthless. There is a column marked doubtful, which the record shows amounts to $168,159.04." The defendant objected to the admission of this evidence, upon the grounds that it was the hearsay report of what the appraisers did, and that he could not be bound by what some appraisers determined in this way. This isolated piece of evidence would be subject to the objection urged against its admission; but when considered in view of the purpose for which it was offered and in connection with the other evidence of this witness, its admission was not improper and erroneous. This witness was the assistant liquidating agent of the affairs of this bank, and was charged with the collection of its bills receivable. The purpose of his testimony was to show the amount of collections made by him on the several classes of notes embraced in this appraisal, and to throw light upon the question of their solvency or insolvency. The purpose was not to prove that this appraisal had been made; but, assuming it to be made, the object was to show how much of the notes classified therein as good, as doubtful, and as worthless, had been collected. The ultimate object was to show whether the notes

appraised as good were good, whether those appraised as doubtful were doubtful, and whether those appraised as worthless were worthless. The purpose was not to show the appraisal, but to determine whether the notes appraised were insolvent. We see no valid reason why this appraisal could not be submitted to the witness, and why he could not be questioned as to the success which he had had in colecting the several classes of notes embraced therein, with the view of throwing light upon the question whether they were solvent or insolvent. For instance, this witness testified that he had been engaged in the collection of these notes three months, and stated the means and methods which he had used in endeavoring to collect the same. He testified that he had not been able to collect anything from the notes classified as worthless, except about $900 from the collateral attached to the note of the Traders Trust Co. for $3,000. He further testified that he had collected from the notes marked doubtful only $500. He then testified, from his experience and information obtained and his efforts to collect these bills receivable, that the notes classified in the appraisal as worthless were as worthless as they could be. In view of the purpose for which this evidence was offered, we do not think that the objection urged was meritorious. Its introduction was an application of the homely maxim that proof of the pudding is chewing the bag. Where the contents of this writing were material to the inquiry, but the correctness of the classification embraced therein was relevant, it was permissible for the witness to refer to such document and to describe it in a general way. Cabaniss v. State, supra.

10. In ground 73 the defendant excepts to the ruling permitting one Bentley, a witness in behalf of the State, to testify, over his objection, as follows: "From my investigation of that kind of collateral and knowing the character and nature of the business carried on by those banks, from a banker's standpoint it was not bankable paper. I would not consider it collateral at all, because it did not appear to have any market value whatever except the market that could be made from the security by the manipulations of the parent bank." The defendant objected to this testimony upon the grounds that it was a pure conclusion of the

witness, with no foundation to justify it, and that the argument of the witness was a grossly improper statement. The court overruled the objection and admitted the testimony with the following statement to the jury: "Gentlemen, it is admitted purely as an opinion. I will charge you fully on these subjects later on, to the effect that you are not to be bound by any opinion expressed by any witness. You will consider all the facts and consider the charge that I will give you in that connection. It is admitted purely as an opinion." Whether these notes were bankable papers or not was necessarily a matter of opinion. The witness qualified as an expert. Besides, he gave the facts upon which he based this opinion. So we can not say that the objection that this testimony was a mere conclusion of the witness, without any foundation, was well taken. We can not say that the testimony was a mere argument, or so argumentative as to deprive it of its character as testimony. In their brief counsel for the defendant assert that this testimony was inadmissible for the reason that it invaded the province of the jury, and undertook to pass upon the very question which the jury was called upon to decide. This objection does not appear to have been urged at the trial, and for this reason we cannot deal with it.

H. C. N. Davie was sworn as a witness for the State. He testified that the Farmers & Traders Bank, just before it suspended business, had applied to the clearing-house banks of Atlanta for a loan of $100,000, and that the loan had been refused. He was then asked, on cross-examination, if he did not know that there was a difference of opinion among the clearing-house banks as to the question of making this loan. The solicitor-general objected to this question, and the court sustained the objection and refused to permit the witness to answer. To this ruling the defendant excepts in ground 74 of his motion for new trial. The exception is without merit. It not appearing upon what ground any difference of opinion among the members of the clearing-house association was based, refusal of the court to permit the witness to answer this question does not show any error requiring the grant of a new trial. The

burden was upon the movant to show harmful error. Such difference of opinion may have existed for various reasons, none of which would throw any light upon the issues involved in this case. Unless it was shown that it was based upon fact or facts relevant to the issues involved, its rejection would not be error.

12. In ground 75 the defendant excepts to the ruling refusing to permit one Cagle, an assistant superintendent of banks of this State, to answer the following question on cross-examination: "How long has it been the established practice of chain banks in Georgia to exchange call money with each other and to help each other out when they need assistance?" The court did not err in this ruling. To make a custom or usage good, it must not be contrary to law. Custom can not change the positive law of the State. Berry v. Cooper, 28 Ga. 543; Happ Co. v. Hunter Mfg. Co., 145 Ga. 836. If these call loans were legal under the banking act, then the making of them did not constitute fraudulent mismanagement of the affairs of the bank. If these call loans, or some of them, were illegal in that they violated statutes of this State governing the management of banks, then any custom under which such loans were made would not render such transactions valid, and would not rebut the presumption of fraudulent insolvency arising therefrom against the president of the bank, who was responsible for the making of such illegal loans.

13. In ground 79 the defendant asserts that the court erred in charging the jury as follows: "Insolvency of a bank alone would not authorize the conviction of the president or directors who were in charge of such bank during the period when it became insolvent, if it did, and when in the process of becoming insolvent, if it became insolvent; but if the State has carried the burden put upon the State and sustained by proof, beyond a reasonable doubt, the truth of the allegations of the indictment and that the bank was at the time alleged and the date alleged insolvent, the law then places the burden on such president or directors having in charge the management of the bank during such period when the bank became insolvent, if it did so as alleged, of repelling the presumption of fraud thus arising,

by showing to the reasonable satisfaction of the jury that the affairs of the bank have been legally administered without intentional fraud, or generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe; and if such showing is made, of which the jurors will be the sole judges, such defendant would be entitled to an acquittal." Error is assigned on the ground that the court in effect instructed the jury that the presumption raised by the statute placed the burden on the defendant of rebutting the same by showing that the affairs of the bank had been legally administered and without intentional fraud, or generally with the same care that agents receiving a commission for their services are required by law to observe. Movant contends that the court thereby excluded from the jury, as a means of rebutting such presumption, any other facts or circumstances which might be sufficient to rebut the presumption; and that the court should not have thus limited the jury in considering what, in their opinion, rebutted such presumption, but should have allowed the jury to consider any other legitimate evidence fairly tending to rebut the same. The defendant further insists that this instruction violates the due-process clauses of the State and Federal constitutions. The court did not by this instruction exclude from the consideration of the jury any other facts or circumstances which might rebut the presumption raised by section 28 of article 20 of the banking act, and did not confine the jury to the method of rebuttal specified in said section. On the contrary, as we shall later see, the court did not so limit the jury. This instruction does not violate the due-process clauses of the State and Federal constitutions; and this is so for the reasons given in the division of this opinion dealing with the overruling of the defendant's demurrer to the indictment.

14. In ground 81 the defendant excepts, for reasons the same as last stated, to the following charge of the court to the jury: "But if the State has carried the burden put upon the State and sustained by proof, beyond a reasonable doubt, the truth of the allegations of the indictment and that the bank was at the time and on the date alleged

in the indictment insolvent, or within a period of four years next preceding the finding and return of the indictment into court, the law would then place the burden on such president or directors having in charge the management of the bank during such period, that is, within a period of four years next preceding the date of the finding and return of the indictment into court, when it is alleged that the bank became insolvent, if it did, as alleged, of repelling the presumption of fraud thus arising by showing to the reasonable satisfaction of the jury that the affairs of the bank had been legally administered without intentional fraud, or generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe, that is, within a period of four years next preceding the finding and return of the indictment into court; and if such showing is made, of which the jurors will be the sole judges, such defendant would be entitled to an acquittal." For the reasons given in the preceding division, the exceptions are without merit.

15. In ground 82 the defendant alleges that the judge nowhere in his charge instructed the jury that the presumption of guilt arising from the insolvency of the bank might be rebutted by any legitimate evidence fairly and reasonably tending to rebut the same. The movant does not allege that this was error; and we could refuse to deal with this ground for the reason that no sufficient assignment of error is set out therein. But we shall deal with it as if the assignment of error were sufficient. The court did in effect give such instruction to the jury, as follows: "Insolvency of a bank, if brought about by shrinkage, reduction in values, by misfortune or erroneous calculations or bad business judgment, or unintentional bad investment or loans, or a sudden run or unexpected crises, or the like, though done or participated in by the defendant, would not authorize a conviction." Here the court gave to the jury in effect the instruction which movant in this ground says should have been given. The court thus did not confine and limit the jury to the method of rebutting the fraudulent insolvency of this bank which is provided by section 28 of article 20 of the banking act. So there is no merit in this ground.

16. In ground 80 the defendant says that the court erred in charging the jury as follows: "Within the meaning of the law, gentlemen, a bank would not be insolvent if its entire property and assets, exclusive of its capital stock due to its stockholders, and also the surplus and undivided profits, if any, are sufficient to discharge its liabilities by a process of liquidation, though it may not be able to pay its debts immediately or to pay or discharge all its obligations on demand; the liquidation mentioned, however, meaning a reasonably prompt liquidation duly carried on, within a reasonable time, considering the nature of the assets and liabilities, and not after indefinite holding with the hope of appreciation or increase in the values; of all of which the jurors would be the sole judges." The errors assigned are that the court instructed the jury: (a) to exclude the surplus and undivided profits of the bank from its liabilities and assets in determining whether they were sufficient to meet its liabilities; (b) to exclude the capital stock of the bank and its surplus and undivided profits from its property and assets in determining its solvency; and (c) to reduce the gross amount of its property and assets by the amount of its capital stock, surplus, and undivided profits, and thus determine whether its remaining property and assets were sufficient to meet its liabilities. Properly construed, this charge did not instruct the jury to disregard the surplus and undivided profits of this bank in determining whether its assets were sufficient to meet its liabilities. It did direct the jury to exclude the capital stock due to stockholders in passing upon this question, and instructed them that a bank would not be insolvent if its entire property and assets, (exclusive of its capital stock due to its stockholders), and also the surplus and undivided profits, if any, are sufficient to discharge its liabilities by a process of liquidation, though it might not be able to pay its debts immediately, or to pay or discharge all of its obligations on demand. The court in effect and properly instructed the jury to exclude as an asset anything due to stockholders on account of their ownership of capital stock in the bank. The capital stock of a bank is not a liability that should be taken into account in determining the question of

solvency or insolvency of a bank, under section — of article 20 of the banking act. Fordham v. State, 148 Ga. 758 (6). In this charge the court in effect instructed the jury that the capital stock due stockholders, that is any liability to them on account of their stock in the bank, should not be considered as an asset. The judge did not in effect tell the jury that capital derived from stock subscriptions, or money due thereon, is not an asset of the bank. On the contrary he instructed that they should consider the entire property, surplus, and undivided profits as assets in determining whether the bank was solvent or insolvent; but should exclude capital stock due to stockholders. In other words, the court instructed the jury that the interests of stockholders in a bank should not be treated as assets in determining this question.

17. The court was requested to give in charge to the jury the following instructions: (a) "To authorize a conviction of the defendant, you must believe beyond a reasonable doubt not only that the Farmers & Traders Bank became insolvent during the four years immediately preceding the date of the indictment, but that such insolvency was caused or materially contributed to by some fraudulent act of the defendant himself." (b) "Even though you should believe that the Farmers & Traders Bank was insolvent at any time within four years prior to the date of the indictment, but that such insolvency existed also more than four years prior to the date of the indictment, you should find the defendant not guilty." (c) "If you should find that the Farmers & Traders Bank was insolvent within four years prior to the date of the indictment, but that such insolvency was caused by causes which existed more than four years prior to the date of the indictment you should acquit the defendant." (d) "If under the evidence in this case you should find that the Farmers & Traders Bank became fraudulently insolvent more than four years prior to this indictment, that is, prior to the 31st day of August, 1922, I charge and direct that you find and return a verdict of not guilty." (e) "The burden of proof is upon the State to show that fraudulent insolvency of the Farmers & Traders Bank, as alleged in this indictment, occurred within four years from the date of the finding of this indictment, that is, between

the 31st day of August 1922, and the 31st day of August, 1926. I further charge you that if under the evidence in this case you should believe that the Farmers & Traders Bank was fraudulently insolvent during the said four years, but you further believe that such fraudulent insolvency occurred prior thereto and merely continued during such period, I charge and direct that you find and return a verdict of not guilty." (f) "If you believe from the evidence that the offense alleged in this indictment against W. D. Manley occurred more than four years prior to the finding of this indictment, then the defendant should be acquitted and you should return a verdict of not guilty." To the refusal to give these instructions the defendant excepts in grounds 83 to 89, inclusive, of his motion. In the charge as given the court instructed the jury that the defendant entered upon the trial of this case with the legal presumption of innocence in his favor, that this presumption continued with him until it was overcome by evidence of such weight and character as to convince the minds of the jurors of his guilt as charged in the indictment beyond a reasonable doubt, and that unless the evidence should convince them to that extent — of guilty would not be authorized. The court further gave the following instructions: (a) "To authorize the conviction of the defendant, the jurors should believe beyond a reasonable doubt that such alleged insolvency of the bank was fraudulent or was brought about and caused by the criminal intention and fraudulent practices of the defendant, either alone or in connection with and knowingly and intentionally aiding and assisting and abetting others named in the indictment." (b) "If the president of a bank that has become insolvent at the time he was indicted or during his administration should show, or if the evidence should show to the reasonable satisfaction of the jury, that his administration of the affairs of such bank has been without intentional fraud, and that there was no criminal intention or fraud on his part contributing to and aiding in the bringing about of the alleged insolvency of the bank, if it was insolvent, he should be acquitted, although the bank may have become insolvent as alleged." (c) "To authorize the conviction of the defendant, the jurors should believe beyond a reasonable doubt that such insolvency of the bank was fraudulent or was brought about and caused by the

criminal intention and fraudulent practice of the defendant, either alone or in connection with and knowingly and intentionally aiding and assisting and abetting others named in the indictment, and that such fraudulent practice, if committed, was committed by the defendant within a period of four years next before the finding and return of the indictment into court." It will thus appear that the instructions requested were fully covered by the charge; and for this reason their refusal does not require the grant of a new trial.

18. The court refused a request to instruct the jury to return a verdict finding the defendant not guilty, for the reason that under the undisputed evidence the insolvency of the bank, whether fraudulent or not, if its insolvency was shown, occurred more than four years before the finding of the indictment. To this refusal the defendant excepts in the 90th and 91st grounds of his motion for new trial. The refusal to direct a verdict is never ground for reversal. Central of Georgia Railway Co. v. Mote, 131 Ga. 166; Ivester v. McNicholas, 157 Ga. 755 (3).

19. But the point just dealt with is urged by counsel for the defendant under the general grounds that the verdict is contrary to the evidence and to law. It is earnestly urged that the undisputed evidence shows that this bank was insolvent as far back as 1915, that its insolvency continued from that date down to the date of its suspension, and that the defendant could not have brought about or contributed to its insolvency within four years next preceding the return of this indictment. It is true that R. E. Bentley, an expert witness in behalf of the State, testified that he had made an examination and analysis of the books of this bank, and that from such examination and analysis said bank was insolvent as far back as the first of 1915, and that such insolvency had continued from that date down to the time the bank closed its doors and went into the hands of the superintendent of banks for liquidation. This opinion of this witness is competent evidence on the question of the insolvency vel non of this bank. Such an opinion is not conclusive upon the jury. The testimony is intended to aid them in coming to a correct conclusion upon the subject; but the jury is not bound by such opinion and can disregard

it. Choice v. State, 31 Ga. 424 (14); Wilcox v. Hall, 53 Ga. 635 (3); Baker v. Richmond City Mill Works, 105 Ga. 225; Bonds v. Brown, 133 Ga. 451 (2); Martin v. Martin, 135 Ga. 162. The jury may deal with such testimony as they see fit, giving credence to it or not. The consideration such evidence is entitled to is a question solely for the jury. Merritt v. State, 107 Ga. 675 (4); Wall v. State, 112 Ga. 336 (2); Rouse v. State, 135 Ga. 227. There are reasonable deductions from the evidence in the case which could lead the jury to the conclusion that the insolvency of this bank took place within four years preceding the return of the indictment. We can not say as a matter of law that the evidence demanded a finding that its insolvency was of earlier date. The court left to the jury the question whether it had occurred within four years prior to the finding of the indictment, and instructed them that the evidence must show that it did occur within said four years, before they would be authorized to find the defendant guilty.

20. The defendant requested the court to give to the jury the following instructions: (a) "Even though you should find that in the management of the Farmers & Traders Bank the defendant, alone or in connection with others, had been guilty of violations of laws or of conduct which you might consider as fraudulent, you would still not be authorized to convict the defendant unless you further believe beyond a reasonable doubt that such fraudulent conduct or violations of law, if any existed, produced insolvency in the bank or was a material contributory cause thereof." "Despite any presumption arising from proof of insolvency of the Farmers & Traders Bank, in the event you should believe beyond a reasonable doubt such proof has been made, the defendant should be acquitted, unless, upon a consideration of all the evidence in the case, you should believe beyond a reasonable doubt that such insolvency was fraudulent, and that the defendant participated in the fraud producing such insolvency." The defendant assigns error upon the refusal to give these instructions, in the 117th and 118th grounds of his motion for new trial. The requested instructions were fully covered by the court in its charge to the jury, as will appear from the excerpts set out in the 17th division, supra. For this reason the re-

fusal to give in charge to the jury the instructions as requested does not require the grant of a new trial.

21. The defendant requested the court to charge the jury as follows: "The defendant himself need not introduce any evidence in order to repel any presumption arising from proof of the insolvency of the bank, in the event it has been proved, but may repel the presumption, if he can, by the testimony and evidence introduced by the State." He assigns error upon the refusal of the request, in the 119th ground of his motion for new trial. The refusal was not erroneous. The evidence introduced by the State in this case does not rebut or tend to rebut the presumption against the defendant, arising from the proof of insolvency of this bank. On the contrary such evidence tends to establish the truth of this presumption. The requested instruction not being warranted by the evidence, the court was justified in not giving it in charge to the jury. McCoy v. State, 15 Ga. 205 (3); Brock v. State, 22 Ga. 98 (2); Nutzel v. State, 60 Ga. 264 (3). Besides, the court instructed the jury that the failure of the defendant to make a statement shall not be taken against him, that no presumption arose against him because he failed to make a statement, and that his plea of not guilty was a denial of all the allegations of the indictment.

2. In ground 120 the defendant alleges that the court erred in admitting in evidence, over his objection, a document referred to as schedule 7 by the witness Cagle, as purporting to show the assets and liabilities of the Farmers & Traders Bank on July 12, 1926, and what of said assets were appraised as good, what were appraised as doubtful, and what were appraised as worthless, in the appraisal said to have been made by Lewis, Morris, Smith, and Arnold. The grounds of objection were that the schedule was hearsay and res inter alios acta, that he was not bound by the valuation placed on the assets by said appraisers, and that their action as written up in this schedule was not admissible against him. In the 121st ground he insists that the court erred in admitting, over his objection on the same grounds, a document or schedule referred to by the witness Cagle as purporting to show the notes receivable in the Farmers & Traders Bank on July 12, 1926, which were said

by R. E. Lewis to have been negotiated to the Farmers & Traders Bank by the Bankers Trust Company, to show which of said notes were appraised as good, which were appraised as doubtful, and which were appraised as worthless, in the appraisal said to have been made by Lewis, Morris, Smith, and Arnold, referred to as schedule 23. These documents were admitted, not for the purpose of showing the truth of the facts therein recited, but solely for the purpose of showing what bills receivable of the bank were claimed by the State to be good, doubtful, and worthless. The State had undertaken by proof to show which of these bills receivable were good, which were doubtful, and which were worthless. These schedules were admissible for the purpose of informing the jury what notes the State claimed to be good, what notes the State claimed to be doubtful, and what notes the State claimed to be worthless; these notes being very voluminous. State v. Brady, 100 Ia. 191, 69 N. W. 290, 62 Am. St. R. 560, 36 L. R. A. 692; Northern Pac. Ry. Co. v. Keyes, 91 Fed. 47; 21 C. J. 896, § 1094, 4.

23. We have carefully read and considered the evidence in this case, and find that the verdict is supported thereby. In fact we do not see how the jury could have reached any other conclusion than that expressed in their verdict.

Judgment affirmed. All the Justices concur, except Atkinson and Hill, J. J., who dissent.

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IN THE SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

W. D. MANLEY, APPELLANT, V. THE STATE OF GEORGIA, APPELLEE.	No. 429 From the Supreme Court of the State of Georgia.

BRIEF FOR APPELLANT.

Statement of Case.

This case involves the constitutionality of a statute of the State of Georgia. It arises as follows:

Manley was indicted on the charge of violating the *28th Section of Article 20 of the Banking Act of 1919 of the State of Georgia.* (*Georgia Laws 1919, p. 219*). As this is the statute which is attacked as unconstitutional it is quoted as follows:

> "Every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years; provided, that the defendant in a case arising under this section, may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally, with the same care and diligence that agents receiving a commission for their services are required and bound

by law to observe; and upon such showing the jury shall acquit the prisoner."

The indictment merely charges in general terms that Manley was President and director of the bank and that the bank did fraudulently become insolvent, no specification or detail being given in the indictment. (R., p. 9).

To this indictment the defendant interposed a demurrer, whereby he raised the contention that the statute was repugnant to the 14th Amendment of the Constitution of the United States. (R., p. 11). This demurrer was overruled by the trial court. (R., p. 15). The case proceeded to trial, resulting in a verdict of guilty, and a sentence of from nine to ten years penal service. (R., p. 17).

The case was carried to the Supreme Court of Georgia and the constitutional question raised by the demurrer duly presented to that court and passed on by that court, and the judgment of the trial court affirmed. (R., p. 21). The Supreme Court of Georgia, however, divided on the question of whether the statute in question was repugnant to the 14th Amendment of the Federal Constitution. The majority opinion, concurred in by four Justices, is shown in the printed record, commencing at page 36. Justices Atkinson and Hill delivered a dissenting opinion, shown in the printed record, commencing at page 41.

The case is here on appeal, since it drew in question the validity of a statute of the State of Georgia as repugnant to the Federal Constitution and the decision was in favor of the validity of the statute. As the constitutional question arises wholly on demurrer and was treated by the Supreme Court of Georgia as adequately presented by the demurrer, it was not deemed necessary to encumber the record before this court by including the evidence presented before the jury, it being obvious that if the statute on which the defendant was convicted is, as asserted by the demurrer

and as thought by two Justices of the Supreme Court of Georgia, void because in conflict with the Federal Constitution, there can be no valid conviction.

Specification of Assigned Errors.

The assignment of errors relates to the action of the Supreme Court of Georgia in affirming the judgment of the trial court in overruling the defendant's demurrer wherein was raised the question of the constitutionality of the statute of the State of Georgia under which the appellant was convicted. The assignment also specifies the action of the Supreme Court of Georgia in affirming the judgment of the trial court convicting the appellant and sentencing him to penal servitude, for the reason that the error of the court in overruling the appellant's demurrer, wherein the constitutionality of the act was questioned, necessarily entered into and affected and vitiated the judgment of conviction. It is contended that the statute of the State of Georgia under which the conviction was had is repugnant to the 14th Amendment of the Federal Constitution and a denial of due process of law in three separate and definite respects, namely:

1. The Georgia statute is vague, indefinite and uncertain. It fixes no ascertainable standard of guilt, but leaves the same to be fixed by the variant views of different courts and juries which may be called upon to enforce the statute. "Men of common intelligence must necessarily guess at its meaning and differ as to its application."

2. The statute does not secure to persons accused thereunder reasonable information as to the nature and cause of the accusation against them.

3. The presumption raised by the statute from the mere fact of insolvency of the bank that such insolvency was pro-

duced by fraudulent and criminal conduct on the part of the particular officer or director under indictment is so arbitrary and unreasonable as to amount to a denial of due process of law.

These points will be considered separately.

(1)

The Statute Is so Vague and Indefinite as to Constitute a Denial of Due Process of Law.

In an effort to determine what is made criminal by this statute we must look beyond the mere presumptions provided by the statute and ascertain what is ultimately punished as criminal.

The statute begins by providing that every insolvency of a bank shall be deemed to be fraudulent and the president and directors sentenced to penal service. Of course the statute does not intend to punish mere insolvency not produced by misconduct on the part of the officers. Not only does the statute not attempt this, but we assume no one would contend that, whatever may be the rule as to civil liability, a state could condemn the officers of a bank as criminals for an insolvency of a bank for which they were in no way to blame. While this particular statute commences with a sweeping condemnation, this is followed by a proviso setting up a defense which is made available to the officers.

Therefore, to determine what is made criminal by this act we must look first to the proviso, since, upon it appearing that a bank had become insolvent, the judicial inquiry would be addressed primarily to whether the accused officer could bring himself within the terms of the proviso.

This is so notwithstanding the fact that the Supreme Court of Georgia has held (see *Griffin v. The State*, 142 *Ga.* 636) that the accused under this statute is not exclusively limited to the defense set out in the proviso but may repel the presumption of fraud by other means, since it nevertheless is clear, and is recognized by the Supreme Court of Georgia, that under this statute the accused may defend a case by showing that he is within the terms of the proviso. The proviso, therefore, is an integral and essential part of the description of a crime denounced by the statute, since, if the facts bring the case within the proviso, there has been no violation of this law.

The substance of the proviso is that a defendant shall be acquitted if he can show three things, namely: (1) that the affairs of the bank have been "fairly" administered; (2) that the affairs of the bank have been "legally" administered; and (3) that the affairs of the bank have been generally administered with the care required of agents for hire, which the Supreme Court of Georgia has defined as meaning "ordinary care". All three must be shown to come within the proviso. (See the opinion in this case, R., p. 40).

To summarize the effect of the foregoing analysis, this statute as a whole, insofar as it defines the crime which is to be punished, does so only by providing generally that fraudulent conduct of an officer of a bank producing its insolvency shall subject him to penal service unless he can bring himself within the terms of the proviso. This is the sum and substance of the construction of the statute as announced by the Supreme Court of Georgia in the *Griffin case, supra*, and in the case at bar.

The statute, both in its general condemnation of undefined fraudulent conduct producing insolvency and in the terms of the proviso, is so vague and indefinite as to constitute a denial of due process of law. The court is asked to bear in mind the complicated character of the business of a bank,

the fact that an ordinary jury is totally ignorant of the nature of banking transactions, the vast field for difference of opinion as to what constitutes "fair" conduct on the part of its officers, or even "fraudulent" conduct on the part of its officers, and perhaps above all the uncertainty and room for difference of opinion which is involved in the standard as to whether the affairs of the bank have been administered with "ordinary care." The statute simply delivers the defendant to the jury and, without prescribing any real standard for determining his guilt, directs the jury to fix a standard according to its own judgment as to the way in which he has handled the affairs of the bank. The liberty of the accused is made dependent upon whether twelve men, who may be, and usually are, totally ignorant of bank management, believe that he has borne the burden of showing that the affairs of the bank were managed fairly and with ordinary care. This judgment is to be based on the "hindsight" of twelve untrained men, and at a time when the minds of the public in the particular community are charged with the excitement and prejudice which will inevitably follow a bank failure whatever may be its cause.

We will analyze in more detail the essential vagueness of this statute. We will point out that it is specifically controlled by decisions of this court which have, on this constitutional ground, invalidated statutes less vague and uncertain. We have endeavored first to present a general picture of the nature and operation of the statute in this respect. It is on its face the most complete piece of legal machinery for oppression which any American legislature has yet devised. Its real meaning and effect is that wherever a bank fails the president and directors shall be sent to the penitentiary if it is the general sentiment of the community in which the failure occurs that this is the proper thing to do. And its operation in this respect cannot be adequately grasped if we lose sight of the fact, which is within the common experience of all of us, that whenever there is a large bank failure it invariably is the general

sentiment of the community that all of those in charge of the bank should be punished—a sentiment which arises without the slightest regard to the actual cause of the failure, and is usually coupled with a widespread inability really to understand the complicated economic factors which frequently enter into a situation of this kind.

As early as *United States v. Blaine*, 139 *U. S.* 306, this court announced the rule that "laws which create crime ought to be so explicit that all men subject to their penalties may know what act it is their duty to avoid."

A long line of cases has arisen, some involving federal legislation under the 5th Amendment, and some involving state legislation under the 14th Amendment, which have considered the denial of due process of law by statutes defining crime in terms so vague that the guilt or innocence of persons accused thereunder is settled by the idiosyncracies of those who constitute the courts and juries rather than by legal standards. A brief review of some of them will be helpful.

In *Collins v. Kentucky*, 234 *U. S.* 634, the court considered a Kentucky statute which made it criminal under certain circumstances to sell pooled tobacco, and made the test of the legality of the pool "whether it raised prices above the real value". The court held that this test of criminality was so vague as to deny due process of law and that the statute was void as violative of the 14th Amendment.

In *United States v. Pennsylvania Railroad Co.*, 242 *U. S.* 208, the court stated that an order of the Interstate Commerce Commission, the violation of which was made a crime, which required tank cars to be furnished "upon reasonable request and reasonable notice" was so indefinite as to be void. While this case did not consider the matter from a constitutional standpoint, it is cited as a controlling

authority by this court in the Cohen Grocery Company case next to be cited.

United States v. Cohen Grocery Co., 255 *U. S.* 81, is a case of great importance. It involved the food control act passed as a war time measure, and had back of the effort to sustain the act all the pressure of the patriotic desire of the nation to support its war time legislation. The act made it a crime "for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The court held the "unjust or unreasonable" test so vague as to make the statute void as a denial of due process of law. The case arose under the 5th Amendment, as it involved congressional legislation. Of course, the same principle applies to state legislation under the 14th Amendment.

International Harvester Co. v. Kentucky, 234 *U. S.* 216, *and American Seeding Co. v. Kentucky*, 236 *U. S.* 660, both involved the same Kentucky statute where the "real value" test determined the criminality of conduct. In both cases it was held that the test was so vague as to render the statute void under the 14th Amendment.

Fox v. State of Washington, 236 *U. S.* 273, *refused to hold* violative of the 14th Amendment a statute of Washington which made it criminal to print any matter tending to encourage disrespect for law; but the court puts its refusal on the ground that the Washington Court had construed the statute as being limited to those publications which sought to induce an actual breach of criminal statutes. It is obvious that this limitation was thought by the court to be necessary in order to sustain the statute.

Connally v. General Construction Co., 269 *U. S.* 385, presents a general review of the cases from this court and a summary of their effect. The particular statute involved was a state law making it criminal for a contractor to pay

his employees "less than the current rate per diem in the locality where the work is performed." The statute was held to be so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, which, the court says, "violates the first essential of due process of law."

The particular importance of this decision is the basis of distinction which it points out between the line of cases cited by us and certain other decisions of this court which had been urged as expressing a contrary view. Such other cases, the court says, are to be distinguished upon the ground, either that "they employ words or phrases having a technical or other special meaning well enough known to enable those within their reach to correctly comprehend them" (the court giving as examples of this, *Hygrade Provision Co. v. Sherman*, 266 *U. S.* 497, and *Omaechevaria v. Idaho*, 246 *U. S.* 343), or they were cases considering words having "a well settled common law meaning." (Examples of this given by the court are *Nash v. United States*, 229 *U. S.* 373, and *International Harvester Co. v. Kentucky*, 234 *U. S.* 216.)

Cline v. Frink Dairy Co., 274 *U. S.* 445, considered a statute of Colorado prohibiting certain agreements and combinations in restraint of trade, with a proviso attached to the statute that such agreement should not be deemed unlawful where the basis and purpose of the agreement was to conduct operations "at a reasonable profit, or to market at a reasonable profit those products that cannot be otherwise marketed." The court held that without the proviso the statute would have been sufficiently definite, but that with the proviso as an integral part of the description of the acts made criminal the statute became so vague as to constitute a denial of due process of law. After stating the substance of the statute without the proviso the court says:

"The foregoing language sufficiently describes for

purposes of a criminal statute the acts which it intends to punish, but the Colorado law does not stop with that. It is accompanied by two provisos which materially affect its purport and effect."

The court then proceeds to point out why the provisos are so vague as to destroy the constitutionality of the statute. We point out this feature of the decision since, should it be held that the Georgia statute, without the proviso, was sufficiently definite, we cite this case as a controlling authority for the proposition that vagueness in a proviso creating an exception to a criminal statute, or a limitation thereon, is a fatal defect in the statute as a whole.

In *Cline v. Frink, supra*, the court then proceeds to point out that where the test of criminality under the proviso involved a standard of what was "reasonable" the standard was too vague to satisfy constitutional requirements. Such a standard is one as to which "men of common intelligence must necessarily guess as to its meaning and differ as to its application." It makes no difference that a standard of this kind is ample in civil cases. Criminal guilt requires a more definitely ascertainable rule. The court refers to the fact that it had held in a headnote per Curiam in *Miller v. Oregon*, 273 U. S. 657, that a statute punishing as manslaughter a homicide due to driving an automobile on a public highway in a careless and imprudent manner was sufficiently definite to furnish due process of law. The court points out, however, that such a standard for an automobile driver is one which would be understood by the average man and is not harsh or arbitrary. The standard of reasonable care, however, cannot be applied as a test of criminal liability to problems arising in complicated economic or business matters. The court uses language which in this respect is controlling on one feature of the case at bar which we quote as follows:

"But it will not do to hold an average man to the

peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result." (Italics by us).

From the foregoing cases the principles to be applied are settled and easily stated. The standard applicable to criminal liability is not that to be applied in civil matters. It must be more definite. It must be one which will enable the average man to determine at the time he acts whether or not he is violating the law. It must not leave the ascertainment of guilt to the idiosyncracies and varying opinions of those who happen to compose the court and jury.

Specifically, such standards as "real value", "unjust or unreasonable rate", "current price", "reasonable profit", "reasonable notice" and reasonable care (except as applied to matters within the ordinary experience of men, such as driving an automobile, and specifically as distinguished from "reasonable care" in economic or business operations) are so vague as standards of guilt as to deny due process of law. Specifically also (see *Cline v. Frink, supra*), if the vagueness arises from a proviso to a general rule it permeates the whole statute and invalidates the whole statute, since no man can determine guilt under the statute without considering the proviso and thereby encountering the vague standard.

A simple application of these established rules to the statute under consideration shows that the cases cited are controlling and that this statute must be condemned.

Taking first the provision of the statute without the proviso, if it can be said to set even a verbal standard of guilt that standard would be fraudulent banking leading to insolvency. There is no effort whatever to define fraudulent banking or to throw any light on what is to be considered

as fraudulent banking in a prosecution under the statute. There was no such crime at common law as "fraudulent banking", or as "fraud". The term "fraud", of course, had a meaning at common law in civil matters, but so had the standard of reasonable care, which, as pointed out in *Cline v. Frink*, supra, when applied to the exercise of judgment as to economic or business conditions is too indefinite to be the basis of a criminal statute. When a statute delivers a defendant to a jury to determine whether in any respect he has been guilty of fraudulent banking in the complicated affairs necessarily incident to bank management and gives no information whatever as to what is meant by fraudulent banking, the final conclusion of a jury will necessarily be determined by the variant views of its members as to business policy and ethical obligations in business transactions rather than by any fixed and ascertainable legal standard. This is therefore exactly the kind of statute which is condemned by the cases cited.

When we come to the proviso we find the vagueness greatly increased. As pointed out, the defendant is not guilty if he can show three things: (a) that the bank was "fairly" administered; (b) that it was "legally" administered; and (c) that it was administered with ordinary care. All three must be shown. The second, as to legal administration is, of course, clear, but merely showing that no law was violated does not bring the defendant within the proviso unless he also shows that the bank has been administered fairly and with ordinary care. There is no way to escape the proposition that an integral element of the determination of guilt under the statute is whether the jury believes that the affairs of the bank have been administered fairly and with what they would consider ordinary care.

The Supreme Court of Georgia recognizes this in the present case. We quote from the majority opinion (R., p. 39).

"These terms are not uncertain and indefinite. The

affairs of a bank are fairly administered when honestly administered. A person of ordinary intelligence, intrusted with the management of the affairs of a bank, knows when he is fairly and honestly administering these affairs. * * * * * This presumption places upon these officers the burden of showing that they administered the affairs of the bank with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe. * * * * * All these terms and requirements of the statute are plain and definite; and, when a defendant who is charged with a violation of this statute shows that he complied with these requirements, the jury is required to acquit him."

What the court says is that a criminal statute is sufficiently definite which makes the guilt of an accused person dependent on the decision of a jury as to whether complicated banking transactions have been managed "fairly" and with ordinary care. Surely no decision could be more directly in the teeth of the cases from this court which we have reviewed. It is certainly no answer to say, as the Supreme Court of Georgia says, that a person knows whether he is fairly administering the affairs of a bank. Does he know that the judgment of a jury, ignorant of banking management, and called "to try him after the fact," will be based on the same standard? The true rule is found in a statement quoted with approval by this court in *Connally v. General Construction Co., supra*:

> "Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

We quote also from *Cline v. Frink, supra*:

> "A legislature must fix the standard more simply and more definitely before a person must conform or a jury can act."

Taken as a whole, the statute does no more than submit to a jury the question of whether in their judgment the general management of the bank by its officers was such that on general principles the jury think the officers should be condemned to penal service.

This case presents in one important respect a perfect illustration of how under this statute the guilt or innocence of an accused will be made to depend on matters of opinion as to which honest and conscientious jurors may entertain entirely different views. Such difference of opinion relates, not to questions of fact, but to problems of policy, judgment, and business ethics, as to which no standard whatever is set by the statute itself. The illustration is found in this: The most serious criticism of the management of this particular bank which is indicated by the statement of facts prepared by the Supreme Court of Georgia is that just before its failure, and when it was rather in need of money, it loaned, without security, $80,000 in different loans to twenty-four other banks which were members of what the court speaks of as "the Manley chain". (R., p. 33). Just what is meant by a chain of banks is not defined by the court, but it indicates a number of allied banks with closely interlocking relations of mutual support and known to the public as parts of a connected chain. These loans were made without security. The borrowing banks, with one exception, failed; and a large part of the $80,000 was lost. The inference suggested is that Manley as President of the particular bank out of which this indictment grew was misusing its funds to help other banks in the same chain.

Now, as pointed out, this is plainly the most serious criticism of his management, since it occurred just before the failure of the bank. The various loans which are crit-

icised, other than the ones now under consideration, were either repaid before the failure of the bank, as shown by the statement of facts, or had been made a long time before its failure when its finances did not appear in such critical shape. It is fair to suppose, therefore, that if the jury went any farther than merely considering that the accused should be convicted on general principles because his bank failed, (enhanced by the fact that his chain had failed), they probably were more impressed by these loans to other banks of his chain, made at this critical time, than by anything else in the case. Certainly this may be true. Certainly the statute is such as to submit such question to the jury as a basis for a conviction, on the theory that he was not managing the bank fairly or with due care.

Now, were these loans to other members of the chain of banks fraudulent banking, or should the making of the loans be considered "fair" management of the particular bank? On the one hand it may be said that when the particular bank making the loans was pressed for money and the defendant knew his other banks were in danger of failure it was a gross injustice to this bank for such loans to be made. On the other hand many conscientious men in the position in which the accused then found himself would have taken an entirely different view, and would have felt that they could best save this bank from failure by saving the other banks in the same chain.

It is, of course, clear that if several members of a system of chain banks fail the whole chain is likely to be swept away. Students of banking differ as to the economic soundness of the idea of chain banking. It is said that it furnishes greater security to depositors because the stronger banks in the chain can help the weaker ones. It is certainly true, however, that the weak ones can imperil the strong ones, and the chain must stand or fail practically as a whole.

In making the loans the particular bank was not only helping the banks to which the loans were made, but it was protecting itself as well, because only by saving the chain could it save itself. If the defendant had taken the other course and had refused help to the other member banks, and their failure had precipitated the failure of the bank in question, he would, under the statute, have stood presumptively guilty of fraudulent banking. He had no way of knowing in advance of the verdict which course would be considered fair, and which course unfair, by the jury; and the presumption was against him no matter which course he took.

From the standpoint of the accused, it would have been to his own selfish interest not to make the loans; since, if he could save any of his banks, he would save something for himself. But most conscientious men in his position would feel that for the stronger banks in the chain to help the weaker ones, so far from constituting fraudulent banking, is in reality a duty resting upon such stronger banks and upon those in charge of their management.

We do not undertake to say which of these views is the sound view. The point is this: That a banker, faced with this problem, must make a decision which either way it is made will be thought by some to have been wrong and to have constituted unfair management of the bank or banks; and as to this the statute furnishes no standard or criterion whatsoever.

(2)

The Statute Denies Due Process of Law in That It Furnishes the Accused No Information as to the Nature and Cause of the Accusation Against Him.

An indictment found on this statute need give no infor-

mation as to claimed misconduct on the part of the defendant, since "it does not devolve upon the prosecution to allege, nor to prove in the first instance, any more than the fact that the bank became insolvent while under the management and control of the accused."

Snead v. The State, 165 *Ga.* 44.

In *United States v. Cohen Grocery Co., supra*, the court pointed out that a vague criminal statute of this kind is defective, among other reasons, because it fails to carry information to the accused of the nature of the accusation against him based on the statute. It was discussed in that case in its relation to the 6th Amendment to the Federal Constitution, but the 14th Amendment, as applied to State legislation, necessarily requires that a person accused of crime be given reasonable notice of the nature of the accusation against him. Indeed, notice and an opportunity to be heard are the most fundamental rights guaranteed as due process of law. The court looks to the substance and not to the details of procedure and inquires whether the accused has really been given proper information as to the charge against him.

> "The essential elements of due process of law are notice and an opportunity to defend. In determining whether such rights are denied we are governed by the substance of things, not by the mere form."
>
> *Simon v. Croft*, 182 *U. S.* 427.
> *Louisville & Nashville Railroad Co. v. Schmidt*, 177 *U. S.* 230.

Does an indictment framed under this statute, alleging merely that the bank became insolvent while the accused was one of the persons charged with its management, carry any real information to him as to the charges on which he is actually to be tried? It goes through the form of stating

a charge against him; but disregarding mere form and looking to substance, does it really carry the minimum of information which an accused must have in order to be given a reasonable opportunity to defend?

Consider the situation of such an accused. The prosecution need charge and prove only that the bank has become insolvent while he was president or a director. He then assumes the burden of showing that at all times, at least within the last four years which are provided by the statute of limitations,[1] the bank has been fairly administered,[2] no laws have been violated,[3] and it has been managed with ordinary care. He may, under the Supreme Court decision, undertake to defend in another way by exculpating himself from any fraudulent conduct contributing to the failure of the bank. As in the nature of things it would be impossible for him to take up each particular transaction which the bank had conducted within the past four years, he must make this proof in general terms, if at all. Thereupon the prosecution may repel the proof offered by the accused *by attacking any transactions which it elects to criticize which have occurred in the last four years, and if any one of the transactions is shown to be either unfair or contrary to law, or managed without ordinary care, or involving fraudulent conduct on the part of the accused, then the accused has failed to sustain his defense under the statute.*

As to which transactions the prosecution will criticize the accused has no information whatever, and as to any one of them which the prosecution elects to criticize the accused is presumed to be guilty until he shows the contrary. The impossibility of being prepared to defend every single transaction occurring in four years of banking operations is too manifest to require comment; yet this is exactly what is necessary to be ready to defend an indictment under this statute. Such an indictment simply cannot be defended if there is a strong local sentiment against the accused.

Suppose an indictment had read that the accused was charged with a crime in that, at some time not named in the indictment, in some respect not named in the indictment, and in some transaction not named in the indictment, he had been guilty of fraudulent banking. We take it no one would contend that such an indictment carried to the accused sufficient information as to the nature and character of the charge against him as to supply the notice required as due process of law. An indictment, under the present statute, is exactly this in substance, except that the prosecution is not limited to any one transaction but may bring up any number of them which it desires, as to each of which the accused starts with the presumption against him and the jury is instructed to find him guilty unless he affirmatively shows the contrary.

Due process of law guarantees to an accused, in criminal cases, the right to be informed with clearness and certainty of the crime with which he stands charged together with every ingredient of which the offense is composed.

What such right includes has thus been stated by this Court:

> "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may

decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

United States v. Cruikshank et al., 92 *U. S.* 542, 558. In *Rosen v. United States*, 161 *U. S.* 29, 40, this Court said:

"The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense."

The doctrine here contended for has been thus stated:

"The accused must receive sufficient information to enable him to reasonably understand, not only the nature of the offense but the particular act or acts touching which he must be prepared with his proof; and when his liberty, and perhaps his life, are at stake, he is not to be left so scantily informed as to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts with the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts."

United States v. Potter, 56 *Fed.* 83, *see p.* 89.

Since the Supreme Court of Georgia has held that an

indictment sufficiently meets the requirements of the statute when it alleges only that the bank became insolvent while the defendant was one of its designated officers (*Snead v. State*, 165 *Ga.* 44, and especially the 5th, 6th, 7th, 8th and 9th divisions of the opinion on pages 53, 54, and 55), it is necessary to attack the statute as being unconstitutional for such an uncertainty. We could not demur to an indictment where everything which the Supreme Court of Georgia has held is required to be alleged under the statute is alleged. In such a situation, if such notice is not sufficient the defect is in the statute itself. This is substantially the view taken by this court in *Cohen v. United States, supra.*

Let us look to the practical working of this statute as illustrated by the majority opinion in the case at bar. The majority opinion holds that certain evidence was erroneously admitted over the objection of the defendant which would ordinarily require the grant of a new trial. (R., p. 55 and 56.) The court then proceeds to hold that notwithstanding the illegal character of the trial a new trial will not be awarded because the evidence demanded the conviction of the accused. (We merely note in passing that in a later part of the opinion the court holds that the evidence would have authorized the acquittal of the defendant but did not demand the acquittal as a matter of law. R., p. 71, 72.) The court arrives at the conclusion that the evidence demanded conviction by saying first that the undisputed evidence showed that the bank was insolvent. The court then says that the burden was cast upon the defendant of showing that the affairs of the bank had been fairly and legally administered, and points out three respects in which it says the evidence required a finding that the statutory requirements as to banks had not been complied with. Since the evidence required a finding that *some* banking statutes had not been complied with the court concludes that the burden cast upon the defendant had not been borne and his conviction was required as a matter of law, and refuses to grant a

new trial even though holding that what would ordinarily be reversible error had been committed.

It is worth while to consider these violations of statutes pointed out by the court. It appeared that the defendant had overdrawn his account in a rather moderate amount without the authority of the board of directors and, as the court says, "without such authority the defendant committed a misdemeanor in making such overdrafts. 8 *Parks Code, Supp.* 1922, §2281 (*s*)." It also appeared that the bank had made loans to other banks, some of which were in excess of twenty per cent. of the capital and unimpaired surplus. Such loans, as the court points out, are prohibited by statute. There appears to be no statute making them criminal.

The court also points out that another statute prohibits the lending of more than ten per cent. of the capital of a bank to one borrower except upon good collateral, and that this statute was in some instances violated; a violation of which, however, appears not to be criminal. There is also one other respect in which the court says that it appears as a matter of law that the affairs of the bank were not fairly and legally administered.

It will thus be seen that the actual conviction of the defendant in this case is sustained because of a failure to comply with three statutes in certain matters which are not even hinted at in the indictment, and which at most would constitute only a misdemeanor, punishable under the Georgia law by not in excess of twelve months imprisonment, whereas the defendant was actually sentenced to from nine to ten years imprisonment. The indictment and the statute under which it was framed in no wise suggest to the defendant the possibility of his being charged with violating these statutes on which his conviction is finally sustained, any more than they suggest to him a charge of violating any of the other statutes of the state relative to

bank management, although it would have been competent for the state to prove a violation of any of them in any respect in the trial of the case.

Art. 20 of the Banking Act of 1919 deals with crimes and misdemeanors. (*Ga. Laws*, 1919, *p.* 212 *,et seq.*) It has thirty-eight sections which create twenty-six statutory crimes which may be committed by bank officers. In an indictment under the statute now before the court it would be competent for the state to prove a violation of any one of these twenty-six criminal statutes, most of which are misdemeanors, and upon proof of the violation of any such statute the defendant could be convicted under the statute on which the present indictment was found and sentenced to a maximum of ten years, without regard to whether his trial was legally conducted or not. This is the necessary effect of the decision in the present case.

This is, however, an understatement of the actual burden placed upon the defendant. The banking act is filled with statutory regulations of banks, the violation of which are not made crimes. If it appeared that any of these statutory regulations had been violated the defendant, as pointed out by the Supreme Court of Georgia in the case at bar, would be held not to have sustained the burden of showing that the affairs of the bank had been "fairly" administered. We have still understated the matter. Even though the defendant succeeds in showing that he did not violate any of the twenty-six criminal statutes in the banking act, or any of the statutory regulations as to banks in addition to the criminal statutes, he has not yet borne the burden. It is still open to the state to inquire whether, in any respect not governed by statute, it may satisfy the jury that the affairs of the bank were not administered fairly and with ordinary care.

Now the immediate point is that as to none of these matters on which he is actually tried does the statute under

which he is placed on trial, or the indictment conforming to the statute, give the defendant the slightest information. Under such an indictment it is competent for the state to show a violation of any criminal or civil requirements of the banking act or a failure in any respect not governed by statutes to administer the affairs of the bank fairly and with ordinary care, and to show this *at any time within the four years covered by the statute of limitations*. Probably this also is an understatement. What the statute punishes is fraudulent insolvency. If the insolvency occurs within the statute of limitations it is probable that the court would hold that violations of the banking act, failure to exercise care, etc., occurring prior to that time, could be proved against the defendant.

Further elaboration of all of this would be a mere waste of time. The sum and substance of the whole matter is that no information whatever is given to the defendant as to the matters on which he is really to be tried; that the actual operation of the statute places the defendant before a jury with a sweeping presumption of guilt against him and without that minimum of notice of the real nature of the accusation against him which is of the essence of due process of law.

(3)

The Presumption Created by the Statute Is So Arbitrary and Unreasonable as to Constitute a Denial of Due Process of Law.

The power of a state to regulate the procedure and rules of evidence in its courts does not go to the extent of authorizing it to create, by statute, an arbitrary presumption of guilt, even though the presumption is *prima facie* only. There must be some reasonable and logical connec-

tion between the thing proved and the thing which the statute presumes as an inference therefrom. If the inference is unreasonable and arbitrary, the defendant convicted thereby is denied due process of law. These principles are now fully settled.

Bailey v. Alabama, 219 *U. S.* 219.

Mobile, etc., Railroad v. Turnipseed, 219 *U. S.* 35.

McFarland v. American Sugar Refining Co., 241 *U. S.* 79.

Hawes v. State of Georgia, 258 *U. S.* 1.

Ferry v. Ramsey, 277, *U. S.* 88.

Casey v. United States, 276 *U. S.* 413.

The *Bailey Case* invalidated a statute of the State of Alabama because of a presumption created by the statute. The statute made it criminal to obtain money on a contract for labor and then to refuse to furnish the labor or to return the money so received where there had been a fraudulent intent not to fulfill the contract at the time the money was received. Up to this point the statute could not have been criticized. But the statute went further and provided that a *prima facie* and rebuttable presumption could (not must, as in the case at bar) be drawn by the jury from the receipt of money on such a contract and the failure to work, the presumption being that the person so receiving the money had fraudulently intended not to fulfill his contract at the time of its receipt. This presumption was held so unreasonable as to be beyond the power of the state.

The *McFarland case* held unreasonable and void a statute of the State of Louisiana because of a presumption embodied in that statute. The statute made criminal a monopoly or combination of persons engaged in the refining of sugar in the State and drew a presumption of guilt from

proof that the defendant systematically paid less for sugar in that State than he paid out of the State, and also drew a presumption of guilt from the closing or keeping idle of a sugar refinery for more than one year. The court held the presumption was so arbitrary as to be a denial of due process of law and that the invalidity of the presumption was fatal to the statute as a whole.

Ferry v. Ramsey dealt with a statute of Kansas creating a civil liability only against directors of a bank for knowingly permitting the bank to receive deposits when insolvent. The statute contained a presumption of knowledge of insolvency from proof that deposits were received when the bank was in a failing condition. As to this, this court divided six to three. Three Justices held the presumption unreasonable and the statute void. The majority held that it was unnecessary to consider the reasonableness of the presumption since, being merely a civil case, the State could have provided an absolute liability on the part of the bank's directors independently of their knowledge. A study of the case forces the conclusion that the majority also thought the presumption inherently unreasonable and sustained the statute only because it related to a civil liability which could have been made absolute without regard to the matter to which the presumption related.

Casey v. United States involved a decision in which this court divided five to four. The statute under consideration was the federal statute against purchasing narcotics from other than original stamped packages. The presumption sustained by the majority was a statutory presumption against one in whose possession narcotics in packages not bearing the required stamps are found. The majority held this presumption not arbitrary or unreasonable.

The other two cases cited sustained as reasonable statutory presumptions which also are entirely different from the one now before the court and require no special con-

sideration. All of the cases, however, recognize the fundamental rule that no unreasonable and arbitrary presumption of guilt created by legislative enactment can be sustained consistently with the 14th Amendment of the Federal Constitution.

The presumption now before the court is this: Upon proof that the defendant was either president or director of a bank and that such bank had become insolvent the statute provides that a presumption shall arise of fraudulent banking on the part of such president or director. So vital to the statute is the presumption that the statement of the crime is put in the form of a statement of the presumption, qualified later by the statement that it may be rebutted in certain ways, the language of the statute being: "Every insolvency of a bank shall be deemed fraudulent and the president and directors shall be severally punished," etc.

To define the question more clearly we inquire, first, what is meant by insolvency in this connection. This is answered by the statute itself. *Sec. 5 of Art* 1 of the Banking Act of 1919 (*Ga. Laws*, 1919, *p.* 138), defines the meaning of the term insolvency as used in that act:

> "A bank shall be deemed to be insolvent, first, when it cannot meet its liabilities as they become due in the regular course of business; second, when the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors; third, when its reserve shall fall under the amount herein required and it shall fail to make good such reserve within thirty (30) days after being required to do so by the Superintendent of Banks."

Prior to the adoption of the *Banking Act of* 1919, §204 *of the Penal Code* of the State of Georgia had been in the exact language of §28 *of Art.* 20 *of the Banking Act.* (This is

the statute on which the indictment in this case was founded, and the constitutionality of which is questioned.) The meaning of insolvency of a bank as used in *Penal Code* §204 had come before the Supreme Court of Georgia in *Griffin v. The State*, 142 *Ga.* 6[illegible]. Bear in mind that *Penal Code* §204 was in the same language as the section of the Banking Act involved in the present case, but prior to the Banking Act there had been no statutory definition of insolvency.

In the Griffin case the Supreme Court of Georgia held that insolvency did not mean a mere inability to pay all claims as they matured, since many things might cause such an inability other than fraudulent banking, such as sudden runs on the bank, business depression, and the like. The court held that insolvency as used in this connection was limited to a deficit of assets as against liabilities. On this construction of insolvency the court, in the Griffin case, sustained the constitutionality of the statute, with a strong indication that if insolvency were held to mean merely an inability to pay all depositors on demand the presumption of fraud would be unreasonable in the extreme. The inference is that on such construction the presumption would be unconstitutional.

We quote from the Griffin case as follows:

> "The penal statutes are supposed to prevent fraudulent banking. They are not intended to force all banks to keep all deposits in the vault ready for the depositor upon call. Statutes regulating banking expressly permit the loaning of deposits by requiring the bank to keep on hand a reserve of only 15 to 20 per cent. of their deposits. Does the legislature permit banks to loan 80 to 90 per cent. of deposits, and at the same time fix a heavy penalty for not always having the same money on hand to pay out on demand?"

While this language is quoted by the Supreme Court of

Georgia from another court it is obviously quoted with approval.

In this situation the legislature adopted the Banking Act of 1919, carried into it *Penal Code* §204 *as* §28 *of Art.* 20, this being the statute on which the present indictment was found, and proceeded at the same time to enact a definition of insolvency which makes the insolvency referred to by the statute mean exactly what the Supreme Court of Georgia had held that it did not theretofore mean, and had suggested that it could not mean without being highly unreasonable.

The dissent of two Justices of the Supreme Court of Georgia in the present case is largely predicated upon the ground that this new definition of insolvency makes the presumption so unreasonable as to deny due process of law.

Under this definition of insolvency, any time a bank is unable to pay all of its depositors who demand their money, even though it has abundant assets to liquidate all claims in time, it is insolvent and the president and each director is presumed to be guilty of fraudulent banking.

As the dissenting justices in this case point out, the only way that the bank can always be ready to meet all of its deposits on demand is to keep all of its deposits in cash in its bank vault, whereas the same *Banking Act, in* §29 *of Art.* 19, provides that a bank need keep only fifteen per cent. of its demand deposits as a cash reserve, and if a member of the Federal Reserve System may keep even less. If a bank, in compliance with this statutory permission, lends out eighty-five per cent. of its demand deposits and then more than fifteen per cent. of its depositors suddenly demand their money, the bank is insolvent under the Georgia Banking Act, and a presumption of guilt arises against its president and directors. This presumption has been

raised merely because the bank did exactly what the law authorized it to do, namely, loaned out a large part of its demand deposits, which is, of course, the only way in which a bank can make a profit. We quote from the dissenting opinion in this case: "Fraud cannot be presumed from acts which the law expressly authorizes."

In addition to the fact that this statute authorizes a presumption of fraud where the law has been strictly complied with, we ask the consideration of the inherent unreasonableness and arbitrary character of this presumption.

Consider the things other than fraud which may cause the insolvency of a bank, especially insolvency as defined by the Georgia law. Sudden runs, business depression in the community, bad judgment in making loans, a general deflation in values, the failure of several large customers, an almost unlimited number of economic causes, some of which may involve bad judgment on the part of the bank officials, but all of which are entirely separate from any suspicion of fraud, are the cause of numberless bank failures.

It must be clear as a matter of general observation that the overwhelming majority of bank failures is due to economic causes of the kind indicated, or to fraud and breach of trust by subordinate officers and employees, and that only a relatively small minority of such failures is attributable to the fraud of the president or of the members of the board of directors. Certainly it is a matter of common knowledge that a very large part of the failures are not due to the fraud of those officials named in the Georgia statute. It is unreasonable to attribute all bank failures presumptively to a cause which does not produce a relatively large part of them. To do so is inherently harsh and arbitrary.

But the present statute goes further than this. It does

not simply presume that some officer has been guilty of fraud. It presumes that the *particular officer* who is placed on trial is the one whose fraud has produced the failure. In doing so the statute passes all possible bounds of reason. For example, to take some particular director and from the mere failure of the bank to presume that that particular director had been guilty of frauds which produced the insolvency, would be ridiculous were it not for the fact that it is tragic, both from the standpoint of the accused and as an illustration of what legislative bodies occasionally do.

It is no answer whatever to say that if the particular director is not guilty he is permitted to exculpate himself and to show that the failure was caused by a sudden run, or by a business depression, or by something of a similar character. To say this merely means that the presumption is prima facie and not conclusive; but so was the presumption which this court invalidated in the Bailey case, and the presumption invalidated by this court in the McFarland case. These two decisions settle forever the proposition that a legislature cannot raise an unreasonable and arbitrary presumption against an accused and then sustain the presumption merely because it is prima facie and not conclusive.

In *Bailey* v. *Alabama*, *supra*, this court discusses the position of an accused who had obtained money on a promise to work, who had then broken his contract, and against whom the presumption of guilt had been raised by the statute. The court says:

> "He stood, stripped by the statute of the presumption of innocence, and exposed to conviction for fraud upon the evidence only of breach of contract and failure to pay."

Under the statute now before the court, upon the mere failure of a bank to pay in due course its president and

each of its directors, if indicted, stands in exactly such position and with less reason for the presumption so drawn, since there are more causes other than fraud of the particular officer on trial which might cause a bank to be unable to meet all of its deposits on demand than there are causes other than fraud which might cause a laborer, after receiving an advance from his employer, to break his contract of employment.

When it comes to meeting the presumption thus created a bank president or director is in a worse position than that of the laborer dealt with in *Bailey* v. *Alabama*. In the first place the presumption takes in vastly more territory. The laborer is required to defend only one transaction. The scope of this presumption and the extent to which the defendant must go to meet it and to be prepared for possible attacks upon him has already been pointed out in the preceding section of this brief.

The presumption cannot be sustained upon the theory that the proof to rebut it is peculiarly within the control of the defendant. Where the proof to rebut a presumption is in fact especially under the control of the defendant this is a factor which may be considered in connection with the reasonableness of the presumption; but so far as we know no case has ever sustained a presumption held to be unreasonable and arbitrary merely upon the ground that proper proof is likely to be in the defendant's possession. In the particular case, however, it is not true that the proof on this subject would normally be in the defendant's possession. On the contrary, the proof on the subject would invariably be in the custody and control of state officials. Where is the proof as to the management of a bank, the conduct of its affairs, and the cause of its insolvency usually found? Primarily in its books and records. Not exclusively there of course. Other proof may be taken to supplement what is written in its records and to explain and contradict them, but all such proof is

merely supplementary. The accounting system of a bank and its papers and records are the sources from which the most vital information must be obtained from which the presumption raised by the statute is to be rebutted, if at all. How else could an officer show that the affairs of the bank had been managed fairly, legally and with ordinary care? Indeed, how could he show what the affairs were at all except in such minor number of isolated transactions as he might retain in his unaided memory?

Now, immediately on the insolvency of a bank all of these vital records pass from the control of its officers. *Art. 7 of the Banking Act* (*Ga. L.* 1919, *pp.* 154 *through* 164) requires the Superintendent of Banks of the State of Georgia to take immediate possession of a bank upon its insolvency and to take custody of all of its books, papers and records. Therefore a defendant, against whom this presumption is raised, instead of finding himself in possession of the necessary proof to rebut it, finds that this proof is under the control of the officers of the state by whom he is being prosecuted. There is, of course, legal machinery by which he can force the production of such records at the trial; but the point is that the presumption against him cannot be justified upon the ground that proof to rebut it is in his possession, since in point of fact the state has taken the proof away from him, and the proof with regard to various transactions which the bank was conducting is primarily in the control of his adversaries.

Furthermore, under Georgia law, the defendant is disqualified as a witness, although allowed to make a statement, which the jury may regard or disregard as they see fit, but which is not evidence in the case. It is true that this court held in *Hawes* v. *State of Georgia*, 258 *U. S.* 1, that this in itself is not sufficient to prevent the state from raising a presumption against the accused. But that such a statutory disqualification of the defendant as a witness is a factor which must be given some consideration in con-

nection with the reasonableness of a presumption, was also pointed out by this court in *Bailey* v. *Alabama*.

In the light of all of these considerations it is respectfully submitted that the presumption now before the court is more unreasonable, arbitrary, harsh, and oppressive than any statutory presumption which has heretofore been brought to the consideration of this court.

In Conclusion.

The full nature of this statute cannot be grasped merely from a separate consideration of each of the three points which we have made. Their combined operation produces a result greater than the mere sum of the three. The statute as a whole merely furnishes to a community excited over the failure of a bank a convenient and workable method of sending the president and directors to the penitentiary. Due process means at least that mob law shall not be invited into the court house to masquerade under the guise of legal procedure.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1928

No. 429

W. D. MANLEY,
APPELLANT,

Versus

THE STATE OF GEORGIA,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF ON BEHALF OF THE STATE OF GEORGIA

IT IS SETTLED THAT A STATE STATUTE COMES TO THE SUPREME COURT OF THE UNITED STATES WITH THE CONSTRUCTION WHICH THE STATE COURT HAS PUT UPON IT—THE STATUTE WILL BE TREATED AS MEANING WHAT THE STATE COURT CONSTRUES IT TO MEAN AND AS CONTAINING ALL THE ELEMENTS WHICH THE STATE

COURT HOLDS THAT IT CONTAINS, EVEN THOUGH THE STATE COURT'S CONSTRUCTION MAY DIFFER FROM THE CONSTRUCTION WHICH THE SUPREME COURT OF THE UNITED STATES WOULD GIVE IT.

In the case of Gatewood vs. North Carolina, 203 U. S. 531, where a statute had been construed by the Supreme Court of North Carolina, it was, upon an appeal to the United States Supreme Court, held that the construction given the statute by the Supreme Court of North Carolina would be taken as a part of the statute for all purposes of testing its constitutionality, the court using the following language:

> "In the argument it is insisted that the construction given by the supreme court of North Carolina to the statute is wrong, since, in effect, it reads out the provisions of section 7, and it is urged that it is the duty of this court to disregard the interpretations affixed by the state court, thereby bringing the statute within the prohibitions of the 14th Amendment.
>
> "But it is elementary that, under the circumstances, we must follow the construction given by the state court, and test the constitutionality of the state under that view."

In the case of Board of Education vs. Illinois, 203 U. S. 553, the constitutionality of a statute of Illinois as construed by the supreme court of that state was under review, and this court, in the opinion, used the following language:

> "The construction of the act by the supreme court we must accept as determining the meaning of the act. In other words, we must regard the act as if the legislature had, in explicit language, excluded from its provisions foreign corporations. If this renders the act void, plaintiff in error, whether its argument be tenable or untenable,

seems to be put in the dilemma urged by the defendant in error, and an affirmance of the judgment is required."

In the case of Smiley vs. Kansas, 196 U. S. 447, the validity of a state statute was under review, and the construction of it by the state court was before this court. This court, in the opinion, used the following language:

> "It is well settled that, in cases of this kind, the interpretation placed by the highest court of the state upon its statutes is conclusive here. We accept the construction given to a state statute by that court (citing authorities). Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from that we recognize. It may be that the views of the Kansas court in respect to this matter are not in harmony with those expressed by us in" certain cases which were quoted by the court.

The court then proceeded further on to say:

> "We shall not stop to consider that question nor the reconciliation of the supposed conflicting views suggested by the chief justice of the state. The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations, as well as the method by which they shall be determined."

AS CONSTRUED BY THE SUPREME COURT OF GEORGIA, THE PENAL STATUTE UNDER INVESTIGATION MEANS THAT EVERY INSOLVENCY OF A STATE BANK SHALL BE PRESUMED TO HAVE RESULTED FROM THE FRAUDULENT OR ILLEGAL MANAGEMENT OF ITS PRESIDENT AND BOARD OF DIRECTORS, AND EACH OF THEM IS SUBJECT TO INDICTMENT; THAT THIS IS ONLY A PRIMA

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The statute in controversy, the same being section 28 of Article 20 of the Georgia Banking Laws on page 219 of Acts of 1919, and being in language identical with section 204 of the Georgia Penal Code, reads as follows:

> "Every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years; provided, that the defendant in a case arising under this section, may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally, with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner."

This act has been construed by the Supreme Court of Georgia in four cases, to-wit: Griffin vs. State, 142 Ga. 636; Fordham vs. State, 148 Ga. 758; Snead vs. State, 165 Ga. 44; and in the present case of Manley vs. State, reported in 144 S. E. pg. 170, and a copy of the opinion being in the record in this case.

It will be observed that the act says every insolvency of a bank shall be deemed fraudulent.

The supreme court has held this word "deemed" to mean only "presumed" and that there is only a prima facie presumption that the insolvency is fraudulent.

The supreme court has held that the acts or omissions of the president and directors which are punished are their fraudulent acts causing the insolvency, or their illegal acts causing the insolvency in connection with the management of the bank.

The supreme court has also construed the proviso, which says that the defendant may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered and generally with the same care and diligence that agents receiving commission for their service are bound to observe, and have held also that the defendant may show any other act, such as a panic, or a run on the bank, or some other unforeseen misfortune other than the fraud or illegal act of the defendant to have been the cause of the insolvency. In other words, the statute is, by the decisions of the supreme court of Georgia, reduced right down to the proposition that the fraudulent or illegal conduct of the defendants in the management of the bank must have produced its insolvency, and that if anything other than this produced the insolvency, the defendants should be acquitted.

The proviso, in providing that the presumption of fraud may be rebutted by showing the affairs of the bank to have been fairly and legally administered and generally with the same care of agents, &c., is a provision only for rebutting the presumption of fraud. When the kind of fair and legal management specified is shown, then unless the state should introduce some other evidence of fraud or illegality than the presumption, the defendants would be acquitted. If the state relied only on the presumption then evidence of fair and legal management and proper care in managing the bank's affairs would rebut the presumption of fraud, but of course, as the statute is punishing fraudulent or illegal conduct, it is left open to the state to prove that fraud or illegality as the cause of the insolvency, and the proof of that fraud or illegal conduct, of course, could not be repelled, as could the prima facie presumption, by showing fair and legal administration of the bank, unless the proof of that fair and legal administration was strong enough to overcome the state's proof of fraud or illegal conduct. In other words, it would have to be an inconsistent set of facts with the state's evidence, and, in that event, it would not only be a reply to the presumption of fraud, but if, as just stated, it disproved the facts relied on by the state showing fraud or illegality, it would be a complete defense. Fraud or illegal acts on the one hand causing the insolvency, and an entire fair and legal and faithful management of the bank on the other side, could not co-exist, and, necessarily, the proof of one excludes the other.

Under the decisions of the Georgia Supreme Court hereinafter quoted, the matter is clearly and simply this: that if the defendant's fraudulent or illegal acts should cause the insolvency of a bank, he is guilty under this statute. The Supreme Court of Georgia evolved this construction out of the act by considering both the enacting clause and the proviso. In the main body of the act, it is provided that every insolvency of a

bank shall be deemed fraudulent. Thus the acts of the defendants for which they are to be punished must be fraudulent and must cause the insolvency of the bank. In the proviso to the act, it is said that the presumption of fraud may be repelled by showing that the affairs of the bank had been fairly and legally administered. The court arrived at the construction that if there was any illegality in the administration of the officers producing the insolvency, that under the proviso that was brought within the act.

To fraudulently and illegally administer a bank is the antithesis of fairly and legally administering it, as provided in the proviso.

We will now examine the Georgia cases construing this enactment.

In the case of Griffin vs. State, 142 Ga. 636, the court, on page 641, used the following language:

> "Properly construed, the section does not authorize the punishment of the president and directors 'even though they had nothing to do with the management of the bank and though the insolvency was not brought about by their conduct, or with their knowledge.' The affirmative declaration that the defendant may repel the presumption of fraud, by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents, receiving a commission for their services, are required and bound by law to observe, and that upon such showing 'the jury shall acquit the prisoner,' does not exclude the president or a director of a chartered bank which has become insolvent from disproving, by any legitimate evidence, the presumption of fraudulent mismanagement which may have been raised against him. The fact that in this State the defendant can not testify, but may make his statement not under oath,

which the jury may believe in preference to the sworn evidence, does not render the act invalid, as held in the cases of Vance v. State, and Wilson v. State, supra.

"We think that a fair and reasonable construction of the section of the Penal Code under consideration is, that, upon proof of certain specified facts, a presumption of fraudulent mismanagement would be raised against the president and directors of an insolvent chartered bank; that if such management as is mentioned in the proviso should be shown, the jury would be required to acquit the prisoner or prisoners; but that this would not prevent the accused from rebutting the presumption by proof of other facts, such as that the insolvency was caused by an unexpected panic in the country, or by the speculation of some officer or agent, for which the accused was in no way responsible, or by other evidence rebutting the presumption of fraudulent conduct on his part."

In the case of Fordham vs. State, 148 Ga. 758, headnote 4, dealing mainly with the question of presumption, reads as follows:

"4. Section 204 of the Penal Code of 1910, which declares that 'Every insolvency of a chartered bank, or refusal or failure to redeem its bills on demand, either with specie or current bank-bills passing at par value, shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one year nor longer than ten years: Provided, that the defendant may repel the presumption of fraud, by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents, receiving a commission for their services, are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner,' is not violative of the 14th amendment to the constitution of the United States on the ground that it denies to persons indicted thereunder due process of law or equal protection of the law. Griffin vs. State, 142

Ga. 636 (83 S. E. 540, L. R. A. 1915C, 716, Ann. Cas. 1916C, 80).

"(a) The decision of McFarland vs. American Sugar Refining Co., 241 U. S. 79 (36 Sup. Ct. 498, 60 L. ed. 899), dealt with a statute which was construed differently from the construction placed upon Penal Code section 204 by this court in Griffin vs. State, supra; and while, on the construction placed upon the different statutes, the results were not the same, there was no conflict of principle in the rulings in the two cases.

"(b) There was no error in overruling the demurrer to the indictment."

In the case of Snead vs. State, 165 Ga. page 44, the question was before the Supreme Court of Georgia again upon this identical statute and as to its construction and constitutionality, and on pages 51, 52 and 53, the court used the following language:

"4. In the seventh and eighth grounds of the demurrer is raised the contention that under the terms of art. 1, sec. 1, par. 3, of the constitution the provision in the act that 'the defendant may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are bound by law to observe,' provides a defense so uncertain and indefinite that it can not avail the accused, and therefore that this provision is in violation of the foregoing constitutional provision. In the eighth ground it is said, that, independently of the constitutional provision referred to in the seventh ground, the defense provided is too uncertain and indefinite in its terms to be of avail to the defendant, and sets forth a measure of defense so general and indefinite as to make the question of criminality dependent upon the idiosyncrasies of the men who may happen to constitute the jury, and is of such nature that honest and intelligent men are unable to ascertain what

particular acts it seeks to condemn, and is therefore null and void because contrary to and in violation of law. We shall deal with these exceptions together. Does the language of the section quoted in the demurrer deprive the defendant of anything? We think not. The case is argued as if the one accused of a violation of the law now under consideration is restricted to the provision now under consideration as his whole defense. This is not so. It points one accused of crime to a circumstance or condition which the law guarantees shall entitle him to an acquittal, but it does not preclude him from any other defense properly appertaining to his case or any which may be suggested by the ingenuity of the party or his counsel. It does not preclude him from showing that he was not really the party in charge of the affairs of the bank, nor from showing that the insolvency of the bank was caused by robbery, burglary, embezzlement, or some other offense of which the defendant on trial was absolutely innocent. It does not deny him the right of showing that the insolvency accrued before his connection with the bank, and therefore that no act of his could have been the cause of this condition. This provision can not be said to deprive one charged with a violation of the law in question of any defense. It merely suggests with liberality a defense additional to those referred to and many others which might be suggested according to the facts of the particular case. Our attention has been called to a recent case in the Supreme Court of the United States (Cline v. Frink, . . . U. S. . . . 47 Sup. Ct. 681), in which it is ruled, as it frequently has been ruled before, that any criminal statute which is so indefinite and uncertain as that the decision as to criminality of the act must depend upon the idiosyncrasies of the men who compose the jury is void. We deem it a well-settled principle that a law which charges a crime is void if the construction of that law depends upon personal opinion, whether it be the opinion of those in the jury-box or out of it. But we do not think that the law with which we are here concerned falls within this inhibition. The attack in these grounds of the demurrer relates to a defense merely

> suggested, not required to be made; and the fact that the language used may be indefinite is to the advantage of the defendant, and not to his detriment. Observation and experience have convinced the writer that in the trial of most criminal cases a general defense under the general plea of not guilty is often far more easy to maintain than a defense upon specific points directed with merciless precision to the scrutiny of the court and jury. It must be remembered that, as said by Mr. Justice Lumpkin in the Griffin case, supra, 'The affirmative declaration that the defendant may repel the presumption of fraud, by showing that the affairs of the bank have been fairly and legally administered, . . . does not exclude the president or a director of a chartered bank which has become insolvent from disproving, by any legitimate evidence, the presumption of fraudulent mismanagement which may have been raised against him'."

Thus we see that the court by no means limits the defense to cases of fair and legal administration, or cases where ordinary diligence, such as an agent should exercise, was exercised, as contained in the proviso to this act. It is therefore utterly immaterial whether the words "fairly administered" are certain or uncertain. It is immaterial whether the words "ordinary diligence" are too uncertain to be made the basis of a criminal enactment. They are only thrown in as additional or special defenses pointed out, and the construction of the Supreme Court upon this entire act is that anything is a defense which shows that the defendant did not, by his fraudulent or illegal conduct, cause the insolvency of the bank. It is useless to consume time with discussing whether the words "fairly" or "ordinary diligence" are exact enough expressions to be contained in criminal statutes, because by clear language the Supreme Court has held that this language "relates to a defense merely suggested, not required to be made; and the fact that the language used may be indefinite is to the advantage of the defendant, and not to his detriment," and that the defendants are not precluded from

defending against the charge of fraudulent mismanagement "by any legitimate evidence."

In the case at bar, as reported in 144 S. E. pg. 170, the court, on page 178, said:

> "Are the terms of the above section of article 20 of the Banking Act of 1919, sufficiently plain and explicit as to inform persons of ordinary intelligence what conduct on their part will render them liable to its penalty? Under this statute, proof of the insolvency of a bank raises the presumption that such insolvency is fraudulent. This is perfectly plain. It then provides that the defendant in a case arising under this section may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe, and upon such showing the jury shall acquit him. These terms are not uncertain and indefinite. The affairs of a bank are fairly administered when honestly administered. A person of ordinary intelligence, intrusted with the management of the affairs of a bank, knows when he is fairly and honestly administering these affairs. The affairs of a bank are legally administered when administered in accordance with law. Our statutes make certain acts in the administration of the affairs of banks unlawful. Presidents and directors of banks are chargeable with knowledge of these statutes, and they should acquaint themselves with their terms and requirements. The statute under consideration requires these officers to administer the affairs of the bank in their charge in accordance with these laws. This is perfectly plan. This presumption places upon these officers the burden of showing that they administered the affairs of the bank with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe. This care and diligence is defined by law. It is 'that ordinary care, skill, and diligence required of a bailee for hire.'

Civil Code, section 3581. All these terms and requirements of the statute are plain and definite; and, when a defendant who is charged with a violation of this statute shows that he complied with these requirements, the jury is required to acquit him. In addition, this statute, as construed by this court, permits the accused to rebut the presumption against him, arising from proof of the insolvency of the bank, by showing other facts, such as that the insolvency was caused by an unexpected panic in the country, or by the speculation of some officer or agent for which the accused was in no way responsible, or by any other facts rebutting the presumption of fraudulent conduct on his part. Griffin vs. State, supra. The statute by clear and explicit terms fixes standards by which both the guilt and innocence of a defendant can be determined. It follows that this statute does not violate the due process clauses of the State and Federal Constitutions, for the reason that its terms are so indefinite and uncertain as not to inform one accused of its infraction with what he has to meet on his trial."

The foregoing language of the Supreme Court of Georgia again clearly shows that the things made criminal are fraudulent or illegal acts causing insolvency on the part of these officers. The court, in referring to the proviso and in construing the word "fairly", said: "The affairs of a bank are fairly administered when honestly administered." In this sense, the word "fairly" in the proviso is merely used as the antithesis of the word "fraudulent" in the enacting part of the statute.

The court therefore gives effect to both the words fair and legal administration in the proviso as being the opposite of the word "fraudulent" in the main body of the act, and fraudulent acts mean dishonest acts and illegal acts causing insolvency of the bank.

The court, in the quotation above made, reiterates that, in

addition to the defenses named in the statute, the accused could show "other facts, such as that the insolvency was caused by an unexpected panic in the country, or by the speculation of some officer or agent, for which the accused was in no way responsible, or by any other facts rebutting the presumption of fraudulent conduct on his part."

WE MAINTAIN THAT FOR A STATUTE TO MAKE IT A CRIME FOR THE PRESIDENT OF A BANK, BY HIS FRAUDULENT OR ILLEGAL ACTS, TO CAUSE THE BANK TO BECOME INSOLVENT,—IS NOT TO OFFEND THE DUE PROCESS OF LAW CLAUSE OF THE FEDERAL CONSTITUTION. THE WORD "FRAUD" IS OF PLAIN SIGNIFICATION, ESPECIALLY WHEN USED IN CONNECTION WITH THE MANAGEMENT OF A BANK BY ITS OFFICERS.

The Supreme Court of Georgia, in the following extract from its decision as found on page 178 of 144 S. E. Reporter, and in the cases quoted, shows a full grasp of the question:

> "A statute which makes an act penal in terms so vague that men of common intelligence must guess at its meaning, and differ as to its application, violates the first essential of due process of law. The term of a penal statute creating a new offense must be sufficiently explicit as to inform those who are subject to it what acts or conduct on their part will render them liable to its penalty. This is a well-recognized requirement under ordinary notions of fair play and the settled rules of law. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417; International Harvester Co. v. Kentucky, 234 U. S. 216, 221, 34 S. Ct. 853, 58 L. ed. 1284; Collins v. Kentucky, 234 U. S. 634, 638, 34 S. Ct. 924, 58 L. ed. 1510; Fox v. Washington, 236 U. S. 273, 35 S. Ct. 383, 59 L. ed. 573; American Seeding Machine Co. v. Kentucky, 236 U. S.

660, 35 S. Ct. 456, 59 L. ed. 773; Miller v. Strahl, 239 U. S. 426, 36 S. Ct. 147, 60 L. ed. 364; Tedrow v. Lewis, 255 U. S. 98, 41 S. Ct. 303, 65 L. ed. 524; Kinnane v. Detroit Creamery Co., 255 U. S. 102, 41 S. Ct. 304, 65 L. ed. 531; Weeds, Inc. v. United States, 255 U. S. 109, 41 S. Ct. 306, 65 L. ed. 537; Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. ed. 322. When a criminal statute employs language having a technical or other special meaning well enough known to enable those within its reach to correctly apply it, it does not fall within the condemnation of the above principle. Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502, 45 S. Ct. 141, 69 L. ed. 402; Omaechevarria v. Idaho, 246 U. S. 343, 348, 38 S. Ct. 323, 62, L. ed. 763. So when a statute employs words with a well-settled common-law meaning, although it may contain an element of degree in the definition as to which estimates may differ, it is not void for uncertainty. Nash v. United States, 229 U. S. 373, 376, 33 S. Ct. 780, 57 L. ed. 1232."

Instances of statutes more general and indeterminate than the one in question, which have been sustained and are being daily enforced, are numerous.

The Federal statutes for using the mails to defraud, as contained in section 338 of the United States Code Annotated, Title 18, under the head of Criminal Code and Criminal Procedure, provides:

> "Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" shall mail a letter, &c., is guilty of a crime.

There is no conceivable difference between the statute just quoted and the case at bar. The word "fraud" is used in both cases and in the same general sense.

What could apparently be more general than the language of this Federal statute making criminal the obtaining of money or property by fraudulent pretenses, representations or promises, or what could be more general than to devise a scheme to defraud?

This statute has been upheld and enforced in cases too numerous to mention.

To show the full extent to which the Federal statute just quoted has been followed, we will quote the following cases: United States vs. Dexter, 154 Fed. 890, holding that the statute means the formation of a plan, device or trick to perpetrate a fraud on another; United States vs. Jones, 10 Fed. 469, holding that the statute covers any scheme, the necessary result of which would be the defrauding of somebody; United States vs. Loring, 98 Fed. 881, holding that a scheme may not be unlawful and yet may be within this statute, if its purpose is to defraud other persons; Oesting vs. United States, 234 Fed. 304 (in which certiorari was denied in 242 U. S. 647), holding that under this statute it is sufficient if a scheme appears reasonably calculated to deceive persons of ordinary comprehension; Rimmerman vs. United States, 186 Fed. 307 (certiorari denied 223 U. S. 721), in which it was held the crime was sufficiently shown if the scheme as charged is reasonably adapted to defraud; Harrison vs. United States, 200 Fed. 662, holding that the scheme to defraud may be found in any plan to get money by deceiving persons as to the substantial identity of the thing which they are to receive; Miller vs. United States, 133 Fed. 337, holding that the statute covers even the intentional use of a legal contract which is used to defraud another. We simply quote these cases as showing the practical effect which has been given to this general expression "defraud".

Another Federal statute found in section 83 of Title 18 of United States Code Annotated provides that

> "Whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, shall be" punished, &c.

Here, the thing denounced as a crime is "to defraud the government" by obtaining the payment "of any false or fraudulent claim". What is defrauding is not defined. It is left to the general definition of the term as it is in the Georgia statute. What is a false and fraudulent claim is left to the general description furnished by those words.

In section 88 of Title 18 of United States Code Annotated is the following:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act" &c., such persons are guilty of a crime.

Thus, we see that it is generally enacted that to defraud the United States is a crime. As to the proposition contained in section 88, we find a reference only to one reported case, in which it was objected that the certainty required in the definition of an offense was not accomplished by section 88, which simply makes it a crime to defraud the United States, this being the case of Crawford vs. United States, 30 App. D. C. pg. 1. It was there held that the certainty required in the definition of an offense may be accomplished by the use of

words or terms of settled meaning, or which indicate offenses well known and defined by the common law; and that this had been accomplished in the section just quoted by the use of the terms "conspiracy" and "defraud".

The offense of being a common cheat and swindler is described in the Georgia statute very much as it is at common law, in the following language, the same being section 719 of the Georgia Penal Code:

> "Any person using any deceitful means or artful practice, other than those which are mentioned in this Code, by which an individual, or a firm, or a corporation, or the public is defrauded and cheated, shall be punished as for a misdemeanor."

Here, it is left to the court and jury to decide whether the particular means used are deceitful or artful and whether the result reached is the defrauding of somebody.

In the case of Waters-Pierce Oil Co. vs. Texas, 212 U. S. pg. 86, a statute of Texas was under review, which denounced contracts and arrangements "reasonably calculated" to fix and regulate the price of commodities, &c., and (quoting the language of the decision) "in the act of 1903, acts are prohibited which 'tend to accomplish' the prohibited results."

As to this, the court say, on page 109 of the decision:

> "It is insisted that these laws are so indefinite that no one can tell what acts are embraced within their provisions. In support of this contention it is argued that laws of this nature ought to be so explicit that all persons subject to their penalties may know what they can do, and what it is their duty to avoid. And reference is made to decisions which have held that criminal statutes should be so definite as to enable those included in its terms to know in advance whether an act is criminal or not. Among others, Tozer

v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917, is cited, in which the opinion was by Mr. Justice Brewer, then judge of the circuit court, in which it was held that the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. To the same effect is (citing cases.)" "And also the case of Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L. R. A. 209, 59 Am. St. Rep. 457, 35 S. W. 129, is relied upon, in which a railroad was indicted for charging more than a just and reasonable rate, in which it was held that the law was unconstitutional, for, under such an act, it rests with the jury to say whether a rate is reasonable, and makes guilt depend not upon standards fixed by law, but upon what a jury might think as to the reasonableness of the rate in controversy. But the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited.

"Take the Act of 1903, which denounces acts which 'trend' to bring about the prohibited results. It is not uncommon in criminal law to punish not only a completed act, but also acts which attempt to bring about the prohibited result. In United States v. E. C. Knight Co., 156 U. S. 1, . . . this court said: 'Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its results should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.' This language was quoted with approval in Addyston Pipe & Steel Co. v. United States, 175 U. S. 237."

Further on in the same opinion, the court say, as to the words reasonably calculated to fix the price of commodities, &c.,

"As to the phrase, 'reasonably calculated,' what does it include less than acts which, when fairly considered, tend

to accomplish the prohibited thing, or which make it highly probable that the given result will be accomplished?"

As to the contention that some of the cases quoted involved only civil contracts and that the case at bar involved a penalty, the court say further on page 111:

"It is true that the decisions quoted are in civil cases involving contracts and arrangements held invalid when attacked in proceedings in equity, and did not involve penalties such as were imposed in the case now under consideration.

"And it is to be remembered that we are dealing with an act of the legislature, sustained in courts of the state, with reference to its validity in view of the prohibitions of the Federal Constitution against deprivation by state action of liberty or property without due process of law. In this case the defendant has had a trial in a court of justice duly established under the laws of the state; the question of its liability has been submitted to a jury. The judgment has been reviewed in an appellate court, and the correctness of the findings of fact and rulings of law in the lower court affirmed. We are not prepared to say that there was a deprivation of due process of law because the statute permitted, and the court charged, that there might be a conviction not only for acts which accomplished the prohibited result, but also for those which tend or are reasonably calculated to bring about the things forbidden."

Thus, we see that a jury may be given a general standard of conduct by which to judge the defendant's acts, even in a criminal case, and we submit that it would be nothing novel to submit to the jury, as in the present case, whether the fraudulent or illegal acts of the defendant brought about the insolvency of this bank.

In the case of Nash vs. United States, 229 U. S. 373, which was a conviction in a criminal case on the Sherman Anti-trust

Act, the following, which was the language of that act, was under consideration by this court, the contention being that the statute was so vague as to be inoperative on its criminal side:

> "Every contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction shall be punished" &c.

In answering this objection, the Supreme Court of the United States used the following language:

> "The two counts before us were demurred to on the grounds that the statute was so vague as to be inoperative on its criminal side; that neither of the counts alleged any overt act; that the contemplated acts and things would not have constituted an offense if they had been done, and that the same acts, etc., were too vaguely charged. The demurrer was overruled and this action of the court raises the important question of the case. We will deal with them before passing to matters of detail.
>
> "The objection to the criminal operation of the statute is thought to be warranted by Standard Oil Co. v. United States, 221 U. S. 1 . . . and United States v. American Tobacco Co., 221 U. S. 106. . . . Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. 221 U. S. 179. And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act

cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty,' is cited from the late Mr. Justice Brewer, sitting in the circuit court. Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917, 919.

"But, apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' (citing cases) 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' (citing cases) If a man should kill another by driving an automobile furiously into a crowd, he might be convicted of murder, however little he expected the result. (quoting authorities) If he did no more than drive negligently through a street, he might get off with manslaughter or less. (citing authorities) And in the last case he might be held although he himself thought he was acting as a prudent man should. (citing authorities) But without further argument, the case is very nearly disposed of by Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, . . . where Mr. Justice Brewer's decision and other similar ones were cited in vain. We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act."

Thus, we see that a criminal statute is sustained which deals merely with a combination "in restraint of trade." A jury has

to pass upon the question whether, upon all of the facts, first, a combination is shown; and, second, whether that combination restrains trade or commerce; and, thirdly, whether such combination, by reason of intent or the inherent nature of the contemplated acts, prejudices the public interests by unduly restricting competition or unduly obstructing the course of trade. The latter propositions were construed to be the true meaning of the Sherman Act in the decisions of Standard Oil Co. v. United States, 221 U. S. pg. 1, and United States v. American Tobacco Co., 221 U. S. 106. Thus, the defendant would have to pass on the question as to whether his combination in restraint of trade was so great as to prejudice the public interests by unduly restricting competition. The line of demarcation between a combination which somewhat restricted competition, but which did not unduly restrict it to the prejudice of the public is a very nice distinction, yet the defendant would have to pass on it. It involved a question of degree. Surely, a case under the Sherman Act involves much more latitude than merely passing upon the question of whether the defendant's fraudulent acts produced the insolvency of a bank. The principle being once established that criminal statutes can submit questions of degree, and questions of classifying the nature of an act to a jury, the present case is disposed of. Surely, it would not be hard for a jury to classify an act as a fraudulent act as distinguished from an honest act.

We quote also, in connection with the decision in the Nash case, section 8820 of the Act of July 1890, as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty" &c.

In the case of Sears Roebuck vs. Federal Trade Commission, 258 Fed. 307, the declaration of section 5 of the act was claimed to be void, unless the words "unfair methods of competition" be construed to embrace no more than acts which on September 26, 1914, were identifiable as acts of unfair trade then condemned by the common law. The Federal Court of Appeals, however, replied:

> "But the phrase is no more indefinite than 'due process of law.' The general idea of that phrase as it appears in Constitutions and statutes is quite well known; but we have never encountered what purported to be an all-embracing schedule or found a specific definition that would bar the continuing processes of judicial inclusion and exclusion based upon accumulating experience. If the expression 'unfair methods of competition' is too uncertain for use, then under the same condemnation would fall the innumerable statutes which predicate rights and prohibitions upon 'unsound mind,' 'undue influence,' 'unfaithfulness,' 'unfair use,' 'unfit for cultivation,' 'unreasonable rate,' 'unjust discrimination,' and the like. This statute is remedial, and orders to desist are civil; but even in criminal law convictions are upheld on statutory prohibitions of 'rebates or concessions' or of 'schemes to defraud,' without any schedule of acts or specific definition of forbidden conduct, thus leaving the courts free to condemn new and ingenious ways that were unknown when the statutes were enacted. Why? Because the general ideas of 'dishonesty' and 'fraud' are so well, widely and uniformly understood that the general term 'rebates or concessions' and 'schemes to defraud' are sufficiently accurate measures of conduct."

Therefore, it was a question for the jury in the case at bar, under the well known meaning of the words fraud and fraudulent, to determine whether the defendant was guilty of any fraudulent conduct in connection with his management of this bank which contributed to its insolvency.

A splendid statement which contains the cream of the authorities on the subject of how far a statute can go in using general language to define an offense is contained in 16 Corpus Juris on page 67, and which reads as follows:

> "The legislature in creating an offense may define it by a particular description of the act or acts constituting it, or it may define it as any act which produces, or is reasonably calculated to produce, a certain defined or described result; or it may group together various means by which the end may be accomplished and make any one of such means an offense when done to attain the object denounced by the statute. In the absence of provision to the contrary, a statute may punish an offense by giving it a name known to the common law, without further defining it, and the common-law definition will be applied. In creating an offense which was not a crime at common law, a statute must of course be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty. Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible; but where the legislature declares an offense in words of no determinate signification, or its language is so general and indefinite that it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal, the statute will be declared void for uncertainty. The certainty required may be accomplished, as we have seen, by the use of words or terms of settled meaning, or words which indicate offenses well known to and defined by the common law. It is not necessary to use technical terms, and the legislature may designate the offense by using words in common and daily use; and a penal statute is sufficiently certain, although it may use general terms, if the offense is so defined as to convey to a person of ordinary intelligence an adequate description of the evil intended to be prohibited."

REPLY TO ARGUMENT AND AUTHORITIES OF APPELLANT ON CONTENTION THAT STATUTE IS SO VAGUE AS TO OFFEND DUE PROCESS CLAUSE—NO CASE CITED HOLDING THAT THE WORD "FRAUDULENT," AS APPLIED TO THE MANAGEMENT OF A BANK'S AFFAIRS AND AS TO THE PRODUCING OF INSOLVENCY, IS LANGUAGE TOO VAGUE FOR A CONSTITUTIONAL CRIMINAL ENACTMENT.

Considerable argument is made in the brief of appellant as to the different views jurors might take of the word "fraudulent", the word "fairly", the words "legally administered", and the words "ordinary care". It is unnecessary to consider whether any of these words, save the word "fraudulent" is of uncertain meaning, because, as the Supreme Court has construed the statute, the defendant must be convicted of fraudulently or illegally acting and in a way to produce the insolvency of the bank. The court has also held that the defendant may show any fact as a complete defense which disproves the state's charge as to his fraudulent or illegal act.

Appellant cites Collins vs. Kentucky, 234 U. S. 634; United States vs. Pennsylvania R. R. Co., 242 U. S. 208; United States vs. Cohen Grocery Co., 255 U. S. 581, and other cases holding statutes to be too vague for enforcement. None of them use language anywhere similar to that used in the case at bar.

We have quoted many statutes of recognized validity using language practically the same as our case, and finally the Nash case, supra, holds that a mere question of degree to be determined by a jury may exist in a criminal statute without rendering it invalid.

It may well be said that the word "fraud" or "fraudulent" has a well defined meaning in law. Indeed, it might be well contended that it had a settled common law meaning, although we do not have to go to this extent in order to sustain this law.

Counsel for appellant state in their brief that there is no effort to define fraudulent banking, that there was no such crime at common law as fraudulent banking or as fraud, that the term "fraud" of course has a meaning at common law in civil matters, but it is claimed that it is too indefinite to be the basis of a criminal statute.

We have already quoted numerous criminal statutes containing the word "fraud". In Volume 2 of Bouvier's Law Dictionary, Edition of 1914, page 1307, we find the following:

> "Without the express provision of any statute, all deceitful practices in defrauding or endeavoring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the common law, and punishable according to the heinousness of the offence; Co. Litt. 3 b; Dy. 295; Hawk. Pl. Cr. c. 71.
>
> "In considering fraud in its criminal aspect, it is often difficult to determine whether facts in evidence constitute a fraud, or amount to a felony. It seems now to be agreed that if the property obtained, whether by means of a false token or a false pretence, be parted with absolutely by the owner, it is a fraud; but if the possession only be parted with, and that possession be obtained by fraud, it will be felony; Bacon, Abr. Fraud; 2 Leach 1066; 2 East, Pl. Cr. c. 673.
>
> "Of those gross frauds or cheats which, as being 'levelled against the public justice of the kingdom,' are punishable by indictment or information at the common law; 2 East, Pl. Cr. c. 18, sec. 4, p. 821; the following are examples: Uttering a fictitious bank bill; Com. v. Boynton, 2

Mass. 77; selling unwholesome provisions; 4 Bla. Com. 162; mala praxis of a physician; 1 Ld. Raym. 213; rendering false accounts, and other frauds, by persons in official situations; Rex v. Bembridge, cited 2 East 136; 5 Mod. 179; 2 Campb. 269; 3 Chitty, Cr. Law 666; fabrication of news tending to the public injury; Stark. Lib. 546; and per Scroggs, C. J., Rex v. Harris, Guildhall, 1680; cheats by means of false weights and measures; 2 East Pl. Cr. c. 18, section 3, p. 820; and generally, the fraudulent obtaining the property of another by any deceitful or illegal practice or token (short of felony) which affects or may affect the public; 2 East, Pl. Cr. c. 18, section 2, p. 818; as with the common cases of obtaining property by false pretences."

From the foregoing quotation, it would seem that fraud has a well defined meaning at common law, especially in the following language: "and generally, the fraudulent obtaining the property of another by any deceitful or illegal practice or token (short of felony) which affects or may affect the public," and "the common cases of obtaining property by false pretences."

THE FACT THAT THE STATUTE RAISES A PRESUMPTION THAT INSOLVENCY OF A BANK IS CAUSED BY THE FRAUD OR ILLEGAL ACT OF THE OFFICERS NAMED DOES NOT RENDER IT UNCONSTITUTIONAL. THERE IS A RATIONAL CONNECTION BETWEEN THE FACT FROM WHICH THE PRESUMPTION IS RAISED, TO-WIT, THE FACT THAT THE DEFENDANTS ARE THE MANAGING AND CONTROLLING OFFICERS OF THE BANK, AND THAT THE BANK BECOMES INSOLVENT, AND THE THING PRESUMED, WHICH IS THAT THE BANK BECAME INSOLVENT BECAUSE OF THE FRAUDULENT OR ILLEGAL MANAGEMENT OF

THOSE OFFICERS. IN A LARGE PERCENTAGE OF CASES, IT IS A MATTER OF PUBLIC KNOWLEDGE THAT THE WRONGFUL ACTS OF THE OFFICERS IN CHARGE HAVE CAUSED THE INSOLVENCY OF BANKS, AND IT IS ONLY SUFFICIENT THAT THE CONNECTION BETWEEN THE THING PRESUMED AND THE FACTS FROM WHICH IT SHOULD BE PRESUMED SHOULD BE REASONABLE, AND NOT THAT IT SHOULD BE THE FACT IN EVERY CASE, OR EVEN IN A MAJORITY OF CASES. THE PRESUMPTION IS ONLY PRIMA FACIE AND CAN BE REBUTTED.

In the case of Griffin vs. State of Georgia, 142 Ga. page 636, the Georgia Supreme Court used the following language:

"With certain limitations, the legislature may enact that when specified facts have been proved, they shall, even in a criminal case, be prima facie evidence of the guilt of the accused, and shift the burden of proof. On this power there are limitations, the principal one of which is that the fact or facts which will raise the presumption and shift the burden of proof must have some fair relation to, or material connection with, the main fact as to which the presumption is raised. The inference or presumption from the facts proved must not be merely arbitrary, or wholly unreasonable, unnatural, or extraordinary, but must bear some reasonable relation to the facts proved. To illustrate, if the legislature should declare that every man found wearing a straw hat in September should be presumed to have committed any forgery which took place in that month, such an act would be invalid, because there is no rational connection between forgery and wearing a straw hat, and the presumption would be purely arbitrary. But if the legislature should declare that one found in possession of stolen goods shortly after a larceny should be prima facie presumed to be the thief, and that the burden of rebutting the presumption should rest on him, this would

be valid, the presumption not being purely arbitrary but there being a reasonable connection between the possession of the stolen goods and the commission of the larceny. Moreover, the presumption so raised must not be final, but the accused must be allowed a fair opportunity to make his defense and show all of the facts bearing on the issue, and to have the whole case submitted to the jury for decision, after considering all of the evidence as well as the prima facie presumption, if the facts from which it arises have been proved to exist. Banks v. State, 124 Ga. 15 (52 S. E. 74, 2 L. R. A. (N. S.) 1007, and note); Vance v. State, 128 Ga. 661 (57 S. E. 889); Wilson v. State, 138 Ga. 489, 493 (75 S. E. 619); 2 Jones, Ev. section 196; Mobile &c. R. Co. v. Turnipseed, 219 U. S. 35 (31 Sup. Ct. 136, 55 L. ed. 78, 32 L. R. A. (N. S.) 226, 22 Ann. Cas. (1912A) 463, and note); State v. Thomas, 6 Ann. Cas. 744, 746, and note (144 Ala. 77, 40 So. 271, 2 L. R. A. (N. S.) 1011, 113 Am. St. R. 17); 3 Enc. Ev. 291; 14 Id. 110.

"The exercise of this power by the legislature in relation to chartered banks, so as to raise a prima facie presumption of fraud against the president and directors, upon proof of the insolvency of the bank, is not violative of the fourteenth amendment of the constitution of the United States on the ground that it deals with chartered banks and not with other corporations. Legitimate classification in such cases does not deprive persons within the class of the equal protection of the laws. If banks can not be legitimately classified without including all other corporations in the legislation applicable to them, then all the banking laws of the country, National and State, would have to be declared invalid.

"If the business of banking furnishes a legitimate basis for classification in many respects, is the presumption raised by Penal Code (1910) section 204 an arbitrary presumption, without legitimate basis. That section does not provide punishment for mere insolvency, but contemplates fraudulent insolvency of banks. The president and

directors have duties to discharge in regard to the management of the bank and its affairs. The causes which bring about the insolvency of a bank are much more within the knowledge of its managing officials than of persons not connected with it. To impose on the State, in a prosecution for a fraudulent insolvency, the onus of proving all of the transactions of the bank and the acts of its officials, would place upon it a heavy burden. It is much easier for the managing officials of the bank to show that the insolvency was not fraudulent, but arose from other causes. The facts are peculiarly accessible to them, if they properly discharge their duties. The suggestion that the president and directors frequently take little or no part in managing a bank can have but little weight. It is the duty of directors to direct, though they may commit certain ministerial duties to authorized officers. We have recently had occasion, in regard to trading corporations generally, to declare that while such directors may commit the active management of the business to authorized officers, this will not relieve them from the duty of reasonable supervision, and it was said: 'Unfortunately some directors appear to think that they have fully discharged their duties by acting as figureheads and dummies.' McEwen v. Kelly, 140 Ga. 720 (79 S. E. 777). It is not meant that carelessness will necessarily import guilt; but duties rest upon the president and directors of a chartered bank, in regard to the management of its affairs, which furnish a legitimate basis for a legislative act raising a presumption that they have been guilty of fraudulent mismanagement when the bank becomes insolvent.

"Giving the statute a reasonable construction, the presumption was not intended to be conclusive. The argument that the expression 'shall be deemed fraudulent' meant that it should be finally adjudged fraudulent is unsound. The latter part of the section provides for repelling 'the presumption of fraud;' and the fair construction of the entire section is that the presumption raised is only prima facie, and subject to be rebutted."

Thus, we see that the Supreme Court of Georgia held, first, that the business of banking furnished a legitimate basis for classification; and, second, that the presumption was not arbitrary or unnatural but bore a reasonable relation to the facts to be proved.

The Georgia court gives good reasons for making banks an especial class to themselves, and for raising this presumption. Banks and their officers stand upon a different basis from other corporations. Banks receive the money of the public. All classes, from intelligent and experienced business men to helpless women and children, deposit their money in banks. Custodians of money should be unusually particular and cautious. The temptation to use the money in bank for one's personal benefit, in the way of speculation, investment or otherwise, is very great. The common experience of mankind and the usual numerous safeguards which our laws, federal and state, throw around the operation of banks, show that banks must be subject to more regulation and supervision than ordinary commercial corporations. The large number of bank failures which occur periodically, as a matter of common knowledge, seem to demonstrate that special and stringent rules must be made to cover banking.

We have said this much in favor of classifying banks as subjects for a peculiar legislation not ordinarily applying to other corporations.

When we come to the reason for the presumption against the officers of the bank, we must draw on common knowledge. A very large percentage of bank failures are caused by the peculations of those in charge. The president and directors are those in complete charge of the bank's affairs. All other officials are minor and hold under them. A bank may fail for

various reasons. There may be an unexpected panic, without rhyme or reason. There may be a period of great business depression suddenly coming upon the country, which causes the assets of the bank to be frozen, which would otherwise be liquid; or the failure might be caused by the peculations of some subordinate officer serving under the president and directors; or, again, the president and directors may have been guilty of fraudulent or illegal mismanagement which caused the insolvency. All these things are within the range of possibility and are easily conceivable as causes of the insolvency of a bank. The courts, in looking at this thing of reasonableness of a presumption, have always exercised a commonsense view of the matter, taking cognizance of those things which all men well informed know about. The question is, whether the thing presumed is rationally connected with the fact which gives rise to the presumption. Is there a fair relation between the two things?

The facts in this statute which give rise to the presumption are the control by the president and directors of the affairs of the bank. It is for the state legislature to decide, within reasonable limits it is true, as to whether the thing presumed occurs so often from the facts raising the presumption as to justify the raising of the presumption from those facts. It is for the legislature to judge of whether conduct of the kind in question becomes so common or general as a cause for the insolvency of banks as to authorize the raising of a presumption that, when that insolvency occurs, the fraudulent conduct of the men in charge has brought it about.

This is purely within the domain of state legislation. We might say that it depends upon the facts, practices, and known occurrences as to banks in the particular territory affected by the legislation. There may be something peculiar in the nature

or charter powers of banks in particular states which exposes them more to especial danger from misconduct of officers in charge than in other localities where banks are more carefully guarded. There may be something in the nature of the deposits or in the carelessness of the depositors which would open the bank to more temptation on the part of the officers. The history of the locality, the number of bank failures, the regarded or known causes of those bank failures—are all matters for the state to determine upon in raising a presumption.

We can at least say that there is a rational connection for the presumption against those who control the destinies of the bank. When a bank fails, the mind instantly goes to the query: Who were its officers? What was the trouble? What character of management had that bank had? The very first inquiry that investigators would make into the affairs of the bank would be as to the conduct of the officers. Were they guilty of negligence? Were they guilty of fraud? Were they merely careless or were they thieves? That the destiny of every bank is largely in the hands of its officers, all people know. The difference between a successful bank and one which fails is usually found in the personnel of its managers.

The case most largely relied upon by the other side as to presumption is the case of McFarland vs. American Sugar Refining Co., 241 U. S. 79, in which a presumption of participation in forbidden monopoly from the systematic payment by a person engaged in sugar refining in Louisiana of a less price for sugar than was paid in another state and a presumption of like participation in a monopoly from the keeping idle of a sugar refinery for more than one year,—were held unreasonable presumptions and the statute void. It needs no argument to show the distinction between that case and our case. Many things, manifestly, would have been legitimate cause for pay-

ing a less price for sugar in Louisiana than in other states, as was pointed out by the court. Many causes, such as antiquated machinery, &c., might cause a particular plant to be kept idle more than one year. The court, in that case, however, used the following language:

> "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate'."

The Supreme Court of the United States, in Hawes vs. Georgia, 258 U. S. pg. 1, sustained a law of the State of Georgia in a criminal prosecution providing that the presence of distilling apparatus upon real estate occupied by a man raised a prima facie presumption that he was the distiller of intoxicating liquors. On page 4 of that decision, the court used the following language:

> "It has been decided, as counsel concede, that the legislature may make one fact prima facie evidence of another, and it is certainly within the established power of a state to prescribe the evidence which is to be received in the courts of its own government. Adams v. New York, 192 U. S. 585, 588, 48 L. ed. 575, 578, 24 Sup. Ct. Rep. 372.
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> "In Hawkins v. Bleakly, 243 U. S. 210, 214, 61 L. ed. 678, 683, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917D, 637, 13 N. C. C. A. 959, it is said: 'The establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and that a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of due process of law. Mobile, J. & K.

C. R. Co. v. Turnipseed, 219 U. S. 35, 42, 55 L. ed. 78, 80, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243.'

"Undoubtedly there must be a relation between the two facts. Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145; McFarland v. American Sugar Ref. Co., 241 U. S. 79, 60 L. ed. 899, 36 Sup. Ct. Rep. 498. That is, if one may evidence the other, there must be connection between them,—a requirement that reasoning insists on, and, necessarily, the law.

"We think the condition is satisfied by the Georgia statute. Distilling spirits is not an ordinary incident of a farm, and, in a prohibition state, has illicit character and purpose, and certainly is not so silent and obscure in use that one who rented a farm upon which it was or had been conducted would probably be ignorant of it. On the contrary, it may be presumed that one on such a farm, or one who occupies it, will know what there is upon it. It is not arbitrary for the state to act upon the presumption and erect it into evidence of knowledge; not peremptory, of course, but subject to explanation, and affording the means of explanation. Hawes had such means. An explanatory statement was open to him, with a detail of the circumstances of his acquisition of the place, and he availed himself of it. He could have called others to testify to the circumstances of his acquisition, for the circumstances were not so isolated or secret as not to have been known to others.

"We agree, therefore, with the supreme court of the state, that the existence upon land of distilling apparatus, consisting of the still itself, boxes, and barrels, has a natural relation to the fact that the occupant of the land has knowledge of the existence of such objects and their situation.

"The principle and the presumption depending upon it were certainly not strained against Hawes. To the comment of the court we may add that the distilling apparatus was within 300 yards of his house. It is true that a pasture

intervened, it was testified, between it and his house, and then 'a hill with pines growing on it, and there was a descent down a hill to where the still was located,' though 'it could not have been seen from the house, but smoke arising from it could have been seen. There was across the pasture a path leading towards the still.' It was added, however, 'that the path might have been made by cattle or stock.' And a witness testified that the path was old."

The case just quoted is peculiarly applicable to the case at bar. The presumption raised was from the mere presence of distilling apparatus upon land occupied by the defendant. The statute provided that if any such apparatus were found or discovered on the premises, this was prima facie evidence that the person in actual possession had knowledge of the existence of the same. It was, of course, possible that a large land owner, or even a small one for that matter, might not know of the presence of a distilling apparatus. A man upon a farm of thousands of acres might have a dozen distilleries upon it, and know nothing of any of them. Yet the land was his. He could, by the use of a certain amount of diligence, have discovered the presence of the apparatus. It was held within the power of the state to raise the presumption against him because he might have known of the presence of the apparatus. The only burden put upon the defendant was that of proving why and how he did not know the distilling apparatus was there. As the court said: "An explanatory statement was open to him", &c.

Therefore, we say it is for the state to determine upon how much probability there is of the defendant's guilt from the existence of the facts raising the presumption. There must be some connection between the facts and the thing presumed, and it must not be an arbitrary one, and there is no other or further limitation than this.

It will be observed that in the Hawes case just quoted, the defendant had the presumption raised against him from the simple fact of occupying a status, a relation towards certain land. He was guilty of no active participation in any criminal act of any kind, merely occupying a relation to certain land as owner, and from occupying that relation, the presumption was raised against him.

In the Hawes case, as in all other cases, the mere fact that the statute raising the presumption of guilt makes it possible that an innocent man may be convicted, unless there is an explanation, is not sufficient to make the act unconstitutional. This is the case with all prima facie presumption.

We might also consider the familiar case that a person found in possession of goods recently stolen is presumed to be the thief. This is an ancient doctrine. The person presumed guilty in that case is presumed only from possession to be guilty. This case and the distilling apparatus case are very much in point here, because the officers, in a broad sense, are in possession of the bank. They occupy the relationship, so to speak, of possessors and trustees of that bank. Something happens to that bank while in their possession. The destiny of that bank is in their hands. What that bank does is presumed to be done because of their control, and is it not the most rational presumption, first, that a human agency caused the insolvency of the bank; and, secondly, that that human agency was the agency of the men actually controlling the bank; and, thirdly, could not the legislature go a step further and say that not only that human agency caused the insolvency of the bank or contributed to it, but that it was their fraudulent conduct which caused that insolvency, because if the bank were fairly and honestly run, the chances are that it never would have become insolvent; and

therefore it is brought within the domain of legislation as to a presumption of the cause.

It will be borne in mind that there must simply be a rational relation between the two facts. It is not required that upon a statistical review of the situation, there would be more cases of guilt than innocence upon showing the facts from which guilt is presumed. Courts do not go into any such calculation or statistical inquiry. The actual conclusion of guilt from the fact from which guilt is presumed may be only one case out of ten, and yet the legislature could raise it, if it has a rational connection. It will be thus seen that no court can go into an inquiry as to the proportion of cases of guilt. Therefore, the Georgia law easily meets the first requirement that there is a rational connection between the fact from which guilt is presumed and the guilt itself, to-wit: the close relationship of the defendant to the bank, the fact that he had the opportunity, by his fraudulent acts, to cause the bank's insolvency, and the fact that he was in control of the bank. And then the further requirement of the Bailey case that the presumption is not conclusive, and that the defendant can rebut it is also clearly apparent in the case at bar.

A statute, making possession of a United States license to sell intoxicating liquor presumptive of a sale of the liquor, is constitutional. State vs. Donato, 127 La. 393; 53 So. 662; State vs. Dowdy, 145 N. C. 432; 58 S. E. 1002.

And statutes dealing with the failures of banks have been sustained which practically settle the case at bar.

The legislature may provide by a criminal statute that a failure of a banker shall be prima facie evidence of his knowledge of insolvency at the earlier time of receiving a deposit.

State vs. Buck, 120 Mo. 479; 25 S. W. 573; State vs. Sattley, 131 Mo. 464; 33 S. W. 41; Robertson vs. People, 20 Col. 279; 38 Pac. 326.

Also statutes have been declared valid which provided that the failure of a banker within thirty days after receiving a deposit which is lost to the depositor shall be prima facie evidence of fraud. State vs. Beach, 147 Ind. 74; 43 N. E. 949; Meadowcroft vs. People, 163 Ill. 56; 45 N. E. 991; and, in the Beach case, just quoted, from Indiana, where the statute made it an offense to act fraudulently, an indictment merely using the language of the statute was held sufficient, without setting forth the facts constituting the fraud.

In the Beach case just quoted, it was held that the statute was not unconstitutional as depriving the accused of his presumption of innocence, he having an opportunity to present his defense.

In the Meadowcroft case just quoted, it was held also that the statute did not infringe the rights of due process of the law and trial by jury.

A statute which provided that leaving a hotel or boarding house or surreptitiously removing baggage therefrom without paying for the accommodation is prima facie evidence of intent to defraud, was held to be constitutional. See In re Milecke, 52 Washington 312; s. c. 21 L. R. A. N. S. 259.

A statute somewhat similar was held constitutional in State vs. Yardley, 95 Tenn. 546; 36 L. R. A. 656, and the statute was held not to impair the constitutional right of trial by an impartial jury.

A statute, providing that possession by a junk dealer of certain bottles or kegs without the owner's written consent shall be

presumptive evidence of the unlawful use, purchase and traffic of these bottles, was held constitutional in People vs. Cannon, 139 N. Y. 32; 34 N. E. 757; and a similar law was held valid in the Anselvich case, 186 Mass. 376; 71 N. E. 790.

DISSENTING OPINION IN THE COURT BELOW, TO WHICH ATTENTION IS CALLED IN APPELLANT'S BRIEF, IS ANALYZED, AND WE CONTEND SHOWS NO SOUND REASON FOR DECLARING THIS LAW UNCONSTITUTIONAL.

Justice Atkinson, in his dissenting opinion in the court below, agreed that there was no indefiniteness about the statute in question. After quoting various decisions from the Supreme Court of the United States, Justice Atkinson, on page 189 of 144 S. E., quoted the first clause of the act in question, which reads as follows:

> "Every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years."

And then added:

> "Standing alone, this clause is sufficiently definite to meet the requirements of the Constitution."

The dissenting opinion proceeded upon the theory that the presumption of fraudulent insolvency rendered the act unconstitutional, the minority claiming, as we construe their opinion, that the insolvency might occur from other causes. Justice Atkinson, on page 189 of 144 S. E., thought that the words "affairs" and "fairly" were indefinite, but he added:

> "But, as they are contained only in the proviso which states a rule of evidence, and do not modify or vary the definition of the offense as provided for in the first clause, the fact that they are indefinite does not affect the question."

We respectfully submit that the word "affairs" is not indefinite. Some word had to be used which showed the range of the statute and the kinds of transactions referred to as being criminal on the part of the officers. The defendant's conduct had to relate to the affairs of the bank, or else his fraud could not contribute to the insolvency. Fraud, outside of the bank's affairs, would be irrelevant.

The word "fairly" can not be said to be vague or indefinite, because, as the majority of the court said, it was used in the sense of being the antithesis of dishonestly and fraudulently acting.

Judge Atkinson, in the second division of his opinion, beginning on page 189 of 144 S. E., contended that the presumption of fraud arising out of section 28 of article 20 of the Act of 1919 did not now disclose such a relation between the act raising the presumption and the thing finally presumed as to be reasonable. He admitted that under the old law, which was section 204 of the Penal Code, where the general test of insolvency was a comparison of assets with liabilities, that the presumption was not arbitrary. See page 190 of the opinion. He contended that the decision in the Griffin case, 142 Ga. 636, was based upon the definition of insolvency, which was applied in that case, he contending that there was a reasonable relation between fraud and such insolvency as arises out of an insufficiency of assets to meet liabilities. He quotes a certain part of the decision in the Griffin case on page 190 of 144 S. E. Reporter, but that portion of the decision which he quotes makes no reference to

limiting the presumption to only cases of such insolvency as were then provided for. True, the court did say that the limitation on the power of a state to raise a presumption is that the facts which raise the presumption must have some fair relation to, or connection with, the main fact as to which the presumption is raised.

Judge Atkinson then goes ahead on page 191 to say that the Banking Act was amended by a new definition of insolvency, and that definition is that, first, a bank is insolvent when it can not meet its liabilities as they become due in the regular course of business; second, that it is insolvent when the cash value of its assets is insufficient to pay its liabilities to depositors and other creditors; third, it is insolvent when its reserves fall under the amount herein required and it shall fail to make good such reserve within thirty days after being required by the Superintendent of Banks.

Judge Atkinson contends that, under this new definition as stated in the first clause, there is no such relation between insolvency and fraud as would authorize the statute to declare the insolvency presumptively fraudulent. In other words, he claims as follows:

> "Fraud can not be presumed from acts which the law expressly authorizes. The law expressly authorizes banks to incur debt by receiving money on deposit and lending it out, except the amount required to be kept in reserve as provided in section 27 of article 19 of the said Banking Act. The money received on deposit may be payable immediately on the check or draft of the depositor. The loans made by the bank to others may be payable at future dates. If a bank thus receiving deposits lends out all its money in regular course of business, except the amount required to be kept as its reserve, it could not pay all its depositors on demand if they should demand payment at

the same time. Yet in these circumstances the failure to pay all the depositors would amount to 'insolvency' under the first clause of the definition of insolvency as embraced in section 5 of article 1, and raise a presumption of fraud under section 28 of article 20, notwithstanding every loan made by the bank was perfectly good and would be paid in full at maturity. In transactions of the character mentioned, the bank would have been acting within its usual banking business and in the exercise of its powers as conferred by law, and there should be no reasonable relation between its acts, or so-called 'insolvency,' and fraud. The scheme of the act is to draw a presumption of fraud from proof of facts which the statute expressly authorizes. This is wholly unreasonable. Lawfulness of the acts in lending out deposits to the extent authorized is incompatible with 'reasonable relation' between inability to pay 'on demand' and fraud—the ultimate fact sought to be presumed."

We submit that this reasoning is not sound.

We have already shown that the fact from which guilt is to be presumed (the fraud here) need not be a fact which, statistically speaking, would occur one time out of five with guilt. Generally speaking, it should be a fact which has some relation to guilt, which may be a circumstance pointing to guilt, or which, in a percentage of cases of that kind, might point to the defendant as one of those likely to be guilty. The officers stand in such a relation to the management of the bank, and have such control over its destiny, that if the bank fails, they are likely to be guilty of causing it to fail. This likelihood may be one out of two, or one out of four, or one out of five. The law does not stop to consider that the chances should preponderate in favor of the likelihood; that is, it is not required that, statistically, it should be three out of five, rather than two out of five. It must simply bear a common sense relation to the ultimate fact presumed.

It is perfectly apparent that the fraud of the officers is just as apt to cause the kind of insolvency in clause one as in clause two or three. The officers control all of the acts of the bank, and they are as closely related to the causes which cause insolvency under clause one as under clause two. Insolvency under clause two is arrived at by comparison of assets with liabilities. The officers are responsible for those assets. They are responsible for those liabilities. Their conduct in acquiring those assets and incurring those liabilities may have been honest. If so, the insolvency is not due to their fraud, although due to their act, and they would be acquitted. But the insufficiency of the assets may be due to their fraud. The officers may have purloined those assets. The insufficiency of those assets may be due to fraud in knowingly lending to insolvent persons and getting some collateral benefit, or in knowingly and recklessly lending to insolvent persons. The amount of liabilities may be due to fraud in various ways, unnecessary to enumerate.

Why can not the insolvency which grows out of the failure to pay on demand be equally fraudulent? It is true the law only requires the bank to keep fifteen per cent of its deposits on hand, but it does not compel it to lend out eighty-five per cent of its assets to worthless people. There may be circumstances due to conditions in the community which would make the lending out of eighty-five per cent of the assets a very reckless act, which would likely break the bank. Furthermore, even if the bank does the lawful act of lending out eighty-five per cent of its assets, many of those loans may be fraudulent and worthless. In this very case, Manley, within thirty days before the bank failed, loaned out $90,000.00 of its assets to other insolvent banks in which he was interested, in an effort to save them. He was guilty of gross fraud towards the bank in question, because he never took any security from tottering banks, never

even took a note or other definite evidence of indebtedness, and any jury must have found this conduct fraudulent. Can it be said as to this kind of conduct that, simply because he had a right to lend out a certain percentage of the assets, it was not fraudulent? The law means to lend the assets out honestly. Now, how was this fraud related to the insolvency of the bank? Simply in this way. First, depositors, if knowledge had reached them that eighty-five per cent of the bank's assets has been loaned out to worthless debtors—that, itself, may have caused a run on the bank and rendered it untenable to pay those debts on demand with only the fifteen per cent remaining. In the second place, fraudulently lending that eighty-five per cent might stand very closely related to the failure of the bank to pay its debts on demand, in that if that eighty-five per cent had been well loaned to responsible persons, it could have been rediscounted and the run on the bank thus met, or, if not actually rediscounted, on such a showing of assets, the money could have been borrowed and the failure of the bank to pay its checks and drafts on demand averted. At least, a jury could certainly have so found.

In other words, it will not do to state that there could not be a fraudulent insolvency of the kind described in clause one as consisting of a failure simply to pay debts on demand. That condition could be easily brought about by fraud, and that is all that is required under this statute.

The president and directors stand as much related to a bank and as much in control of a bank having this kind of insolvency to occur as to one having the general insolvency under clause two. Because of this control and relation, and because of the extreme possibility, and even probability, that their fraud might cause this kind of insolvency, the presumption can well be raised.

THERE COULD BE NO VAGUENESS GROWING OUT OF THE WORD "ILLEGAL" AS APPLIED TO THE DEFENDANT'S ACTS CAUSING INSOLVENCY OF BANK. STATE HAS VARIOUS LAWS REGULATING BANK MANAGEMENT, AND VIOLATION OF ANY OF THESE LAWS CAUSING INSOLVENCY OF BANK COMES WITHIN STATUTE.

A mere reference to these laws renders this requirement certain and exact according to the maxim "Id certum est quod certum reddi potest".

In the brief of appellant, reference is made to numerous requirements by Georgia laws in the management of state banks. Many of them are made criminal and others, while laying down a positive rule of conduct, have no penalty attached to them. It could certainly not render this enactment vague because it makes the defendant criminally responsible for an insolvency caused by his illegal acts or omissions in the management of the bank. Persons who operate banks are engaged in a business attended with much peril to themselves. Certainly, one of the most obvious dangers to which they are subject is that of failing to comply with the law regulating the trust confided to them.

As the Supreme Court of Georgia said in this case (see page 178 of 144 S. E.),

> "The affairs of a bank are legally administered when administered in accordance with law. Our statutes make certain acts in the administration of the affairs of banks unlawful. Presidents and directors of banks are chargeable with knowledge of these statutes, and they should acquaint themselves with their terms and requirements. The statute under consideration requires these officers to administer the affairs of the bank in their charge in accordance with these laws."

DEMURRER TO INDICTMENT ONLY RAISES QUESTION OF VALIDITY OF GEORGIA STATUTE OF 1919. SUPREME COURT OF GEORGIA HELD UNDER GEORGIA REQUIREMENTS AS TO PLEADING THAT INDICTMENT WAS SUFFICIENT. SUFFICIENCY OF INDICTMENT AS STATING CASE UNDER STATUTE IN QUESTION DISCUSSED.

The indictment in this case conforms to the Georgia decisions under this particular fraudulent bank insolvency statute. The Supreme Court of Georgia in this case, beginning on page 178 of 144 S. E. Reporter, said:

> "It follows necessarily from what has been said that the indictment is not subject to demurrer upon the ground that said section of said act is void for the reason that its terms are so general and indefinite as to make the question of criminality depend upon the idiosyncracies of the men who happen to constitute the court and jury, and do not enable honest and intelligent men to ascertain what particular act or acts it seeks to condemn."

In the brief of appellant, it is said that the indictment furnishes no information as to what particular acts of illegality or what particular acts of fraud were relied on by the state.

All this was passed on by the court below under the Georgia requirements as to pleading, the Supreme Court of Georgia using the following language on page 179 of 144 S. E., to-wit:

> "Said section of the Banking Act of 1919 is not violative of article 1 (section 1) par. 5, of the Constitution of this state, which provides that every person charged with an offense shall be furnished on demand with a copy of the accusation, in that the indictment does not name the act or acts which are prohibited by law, and is inadequate to inform the defendant of the nature of the accusation against

> him. The indictment need not allege the acts which caused the insolvency of the bank; and it need not specify the illegal acts upon which the state relies to show that the defendant did not administer the affairs of the bank in a legal manner."

In the State of Georgia, the common law forms of pleading in criminal cases are entirely abolished. The effort is to keep pace with modern times in making criminal pleadings as simple as possible. Penal Code of Georgia section 954 provides:

> "Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this Code, or so plainly that the nature of the offense charged may be easily understood by the jury."

It needs no argument to show that the indictment in this case conforms to the Code section. It gives the name of the bank; it shows the connection of the defendant with the bank; it shows the insolvency of the bank and the date thereof; it alleges that the same was fraudulent, and it alleges that the same occurred during the defendant's official relation to the bank and while he was charged with the fair and legal administration of its affairs, and alleges that this was contrary to law.

The benefit of the presumption which this statute raises against the defendant will be entirely lost if the state had to know and charge in advance every illegal and fraudulent act of the defendant which contributed to the insolvency.

When the insolvency is shown, it is presumed that the officers named in charge of the bank were guilty of fraud causing the insolvency and the burden is on them to show their freedom from this fraud As hereinbefore discussed, they can show it in various ways, and the utmost liberality is allowed the defendant in making this proof.

The defendant, when he is indicted in a case of this sort, must necessarily know that the term of his connection with the bank is under investigation. If it be said that it is a hardship on him to keep track of all of his acts and omissions, it can be said that he voluntarily assumed his connection with the bank, knowing the strict requirements of the situation. As a practical matter, it would not be hard for any defendant, if innocent of wrong-doing, to show his innocence. The books and records of the bank are matters accessible, as is admitted in the brief of counsel for appellant. In any event, all these questions are for the state to decide. The state can reverse the burden of proof, if it wishes, in criminal cases. The state can abolish the doctrine that a reasonable doubt of guilt would require an acquittal.

The questions of burden of proof and presumptions of innocence, and the like, are entirely for the states to determine, and if all persons are put upon an equality in regard to these subjects, there is no violation of the due process of law clause.

In the case of Howard vs. Fleming, 191 U. S. 126, the court, in the body of the opinion, said:

> "Again, it is said that there was not due process, because the trial judge refused to instruct the jury on the presumption of innocence. He did charge that the guilt of the accused must be shown beyond a reasonable doubt, and that on a failure in this respect it was the duty to acquit. He also explained what is mean by the term 'reasonable doubt.' The supreme court (of North Carolina) sustained the charge. Of course, that is a decision of the highest court of the state that in a criminal trial it is sufficient to charge correctly in reference to a reasonable doubt, and that an omission to refer to any presumption of innocence does not invalidate the proceedings. In the face of this ruling as to the law of the state, the omission in a state trial

of any reference to the presumption of innocence cannot be regarded as a denial of due process of law."

In the case of Barrington vs. Missouri, 205 U. S. 483, it was held that compelling a defendant in a criminal case to testify against himself, and the admission of evidence in a criminal case which the highest court in a state decides did not violate the rights of the defendant under the state constitution and laws, did not raise any questions as to affording due process of law under the federal constitution.

It has been held that an erroneous ruling on a defective indictment does not present a federal question. Bergemann vs. Backer, 157 U. S. 655; Gibson vs. Mississippi, 162 U. S. 565; Remington Paper Co. vs. Watson, 173 U. S. 451.

Nor does the question as to whether an indictment charges a crime under the laws of a state present a federal question. Davis vs. Texas, 139 U. S. 652; Caldwell vs. Texas, 137 U. S. 692; O'Neal vs. Vermont, 144 U. S. 323.

In an indictment which charges the offense, such as this does, in the language of the Code, all things necessary to a conviction must be proved. Just as the Supreme Court held that this particular statute meant certain things, so this indictment means everything which the Supreme Court holds that the statute means. The proof would have to supply all that the Georgia courts hold must be proved under this statute. The charge of the court below would illustrate just how the law was applied to the defendant's case and what the scope of his defense was, but the charge is not a part of the record, and hence we can not quote from it.

The decision of the Supreme Court of Georgia, as it appears in the printed record, seems to be incomplete, and our quota-

tions have been from the full decision as it appears in the Southeastern Reporter.

THE BANKING LAWS MAKE CERTAIN ACTS ILLEGAL, AND WE WILL INSTANCE A FEW OF THEM UNDER THIS HEADING. SUCH ILLEGAL ACTS CONTRIBUTING TO THE INSOLVENCY OF THE BANK COME WITHIN THIS STATUTE. WE ARE CITING THE CASE OF BITTING VS. STATE, 165 GA. PAGE 55, WHICH SHOWS HOW THESE ILLEGAL ACTS ARE DEALT WITH IN THE CHARGE OF THE COURT.

We will not here cite all of the banking laws applicable to this case. The record in this case, as appears from the decision of the Supreme Court, we contend, shows that the defendant violated the banking laws in several particulars. One section of the banking law provides:

> "No officer, director, agent or employe of any bank shall use or borrow, directly or indirectly, for himself or for any firm or partnership of which he is a member, any money or other property belonging to any bank of which he is such officer, agent or employe, without the express authority and permission, previously obtained, of a majority of the directors or of the members of a committee of the board of directors authorized to act, which permission shall be evidenced by the written signatures of such directors, the borrower not voting or participating in any way in passing upon any loan or discount in which he may be interested."

Another law provides:

> "No bank shall lend any officer, director, agent or employe any amount whatever except upon good collateral or other ample security, and no such loan shall be made

until after it has been approved by a majority of the directors, or by the members of a committee of the board of directors authorized to act."

Another section of the banking law which is too long to quote in full provides: that no bank shall lend any one person, firm or corporation more than twenty per cent of its capital and unimpaired surplus; and further that no loan shall be made in excess of ten per cent of the capital and surplus, except on good collateral or other security approved by a majority of the directors or a committee of the board of directors authorized to act, which shall be evidenced by the written signatures of the directors or members of the committee, and that, in estimating such loans, all amounts loaned to firms and partnerships of which the person is a member shall be included. This act further provides for the buying or discounting of commercial paper owned by the person negotiating the same in addition to loans directly made to such person, and further provides that the limit of loans shall not apply to loans made on the security of agricultural, manufactured and industrial products having a market value, and for which there is a ready sale in the open market, and which is adequately secured by insurance against fire loss, in which event eighty per cent of the value of the commodities may be loaned, with various other conditions in relation thereto.

As also appears from the decision of the Supreme Court, Mr. Manley, the President, had withdrawn from the bank in question $90,000.00 within about thirty days before its failure, for which no note or security was given.

We will not call attention to the various other acts of the defendant enumerated in the opinion of the Supreme Court of Georgia, because the sufficiency of the evidence is not before this court.

In the case of Bitting vs. State, 165 Ga. page 55, we call attention to that portion of the decision on pages 77 and 78 as illustrating how the violations of law by a banker, and which contribute to the insolvency of the bank under the statute in question are dealt with in the charge of the court, that charge being as follows:

> "In ground 27a of the motion for a new trial complaint is made that the judge charged the jury: 'I want to read you certain sections of the banking law that will guide you in determining whether or not the affairs of the bank in question were legally administered. Section 7, page 67, of the banking law says: The board of directors, at the meeting at which report of examination shall be made to the board of directors, that is, the semi-annual examination, is read, shall, by resolution entered on the minutes, require that all debts due to the bank, which are past due for a period of one year, and which are not amply secured, shall be collected, placed in suit, or charged to profit and loss; that all past-due interest shall be collected upon any note upon which no interest has been paid within the last preceding twelve months, or that said note shall be collected, put in suit, or charged to profit and loss; and that all assets or claims in favor of the bank, which in the opinion of the directors are worthless or uncollectible, shall also be charged to profit and loss and not included in the list of assets of the bank. Said board shall at such meeting also require that all loans in excess of the amount herein authorized to be made shall be reduced at once, so as to bring them within the proper amount. A certified copy of the resolutions of the board acting on the matters brought to their attention in the report of the semi-annual examination shall be filed with the superintendent of banks within ten days after said meeting shall have been held.
>
> "Section 13, page 70, of the banking law declares: No bank shall be allowed to lend to any one person, firm, or corporation more than twenty per cent. of its capital and unimpaired surplus. And no loan shall be made in excess

of ten per cent. of the capital and surplus, except upon good collateral or other ample security, and with the approval of a majority of the directors or of a committee of the board of directors authorized to act, which approval shall be evidenced by the written signatures of said directors or the members of said committee. Now that applies to a loan made subsequent to August 21st, 1922; prior to that time the law provided that no bank should be allowed to lend to any person, firm, or corporation more than thirty per cent, of its capital and unimpaired surplus and undivided profits; and the other provisions of the law prior to August 21st, 1922, were the same as in section 13 which I have just read to you; and the law as it stood prior to August 21, 1922, applies and regulates the making of loans prior to the passage of the act of August 21, 1922, that is, if you find that any loans were made prior to August 21st, 1922.

"Section 27, page 77, of the banking law provides: Every bank whose deposits are subject to check shall at all times maintain a reserve of fifteen per cent. of the amount of its demand deposits and five per cent. of the amount of its savings and time deposits. Savings banks and trust companies—the part with reference to savings banks and trust companies does not apply to the bank in question, and I will omit that. Such reserve shall consist of lawful money of the United States, gold certificates, Federal Reserve or National bank notes, in the office and vaults of the bank, and of moneys on deposit subject to call with other banks or bankers, such banks or bankers to be approved by the superintendent of banks; provided that the reserve against savings and time deposits may be invested in bonds of the United States or of this State at the market value thereof.

"The State insists in this case that the defendant on trial has violated those sections of the banking laws—those provisions of the banking law. The defendant denies that he

has violated any provision of the banking laws, but insists that if there was any violation of any banking law it was not intentional on his part. Now you would not be authorized to find the defendant guilty of a violation of any of these provisions of the banking laws which I have read you; the defendant is being tried on the charge made in the bill of indictment; but I have given you these provisions of the law that you may consider them in passing upon the guilt or innocence of the defendant of the crime charged against him in this indictment. Now in passing on this question as to whether or not the defendant has legally administered the affairs of the Bank of Commerce, you are the judges of that; you are to settle that question from the evidence in the case, taking into consideration along with the evidence the defendant's statement, as to whether or not the defendant in this case, either alone or in connection with other directors of the Bank of Commerce of Chattooga County, violated any of the provisions of the banking laws to which I have called your attention. In passing upon the question of whether or not the affairs of the bank involved in this case were legally administered, in so far as such administration was in the hands of the defendant, or under his supervision, control, or management, either alone or in connection with or in conjunction with other directors, you will consider the evidence and the defendant's statement as applying to the sections of the banking laws read to you, and which the State contends, and which the defendant denies, were intentionally and knowingly violated by the defendant. If the defendant intentionally and knowingly violated the provisions of the banking law to which I have called your attention, his act in such respect would be illegal; if not knowingly and intentionally done, or if done by or through mistake or error, or as the result of mismanagement, you will not consider such conduct, if any such has been proven, as in violation of the law.'

"The court did not err in instructing the jury as to the acts denounced in the Code as illegal. The jury were instructed as to other acts made penal in the conduct of a bank. We do not think that the court erred in giving these instructions."

Respectfully submitted,

JOHN A. BOYKIN, *Solicitor General*,
Atlanta Judicial Circuit, State of Georgia,

REUBEN R. ARNOLD,
Attorneys for State of Georgia.

SUPREME COURT OF THE UNITED STATES.

No. 272.—October Term, 1928.

W. A. Marshall & Co., Inc., Petitioner, vs. Steamship "President Arthur," her Engines, Boilers, etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 20, 1929.]

Mr. Justice Sanford delivered the opinion of the Court.

In May, 1925, W. A. Marshall & Co., Inc., filed a libel in admiralty in the federal District Court for Southern New York against the Steamship "President Arthur," asserting a maritime lien thereon for an unpaid balance of the purchase price of bunker coal furnished by it on the request of the owner to and for the use of the steamship. The owner, the American Palestine Line, Inc., answered as claimant, denying that the Company had a lien on the steamship and alleging that the entire purchase price had been paid in accordance with the contract of sale.

At the hearing the District Court held, on the evidence, that the Company had no lien on the vessel, and dismissed the libel. 22 F. (2d) 584. This decree was affirmed by the Circuit Court of Appeals. 25 F. (2d) 648.

The evidence—which is undisputed—shows that when the negotiations were entered into for the coal the Line wished to pay for it on longer terms than were usually granted, and that the Company, after investigating the standing of the Line, not believing that it was financially responsible, and wanting additional security, required the Line to give trade acceptances endorsed by responsible and acceptable persons; with the purpose that, if needed at any time, the money could be obtained by discounting the acceptances, thus endorsed, prior to their maturity.

Thereupon, in February and March, 1925, the parties entered into two written contracts for the coal. Each of these provided that the Company should sell and the Line, as owner of the steam-

ship, should buy, at a specified price, a designated amount of coal "to be used as bunker coal for" the steamship, and to be delivered on specified dates. Each provided that the Line should "pay for the said coal as follows: By delivering" to the Company two trade acceptances, dated the date of the delivery of the coal, due March 10 and May 8, respectively, and "endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb." Neither contract referred to any lien on the vessel; and each recited that "The entire contract between the parties is stated above and there is no outside condition, warranty, agreement, or understanding." At the foot of each contract the persons named as endorsers also signed an agreement reciting that "In consideration of the execution of the foregoing contract" and the delivery of the coal to the Line and of one dollar, they jointly and severally agreed to endorse the trade acceptances described in the contract.

Without the consideration of such endorsements, it was shown, the Company would not have sold the Line the coal.

The coal called for by the contracts was delivered to the steamship. The purchase price amounted to $21,736.16. For this the Line gave the Company its two trade acceptances endorsed by the three designated persons; these being consolidations of the four acceptances required by the two contracts. The acceptance for $11,794.54, first maturing, was duly paid. The acceptance for $9,382.62, maturing later, was not paid and was protested. This was the amount of the balance for which the Company claimed a lien.

After filing the libel, the Company also brought a civil action upon the unpaid acceptance in a state court, against the endorsers only. This is still pending and undetermined.

The questions presented here are: whether under the contracts the Company waived the maritime lien which it would otherwise have had on the steamship to secure the payment of the purchase price; and, if not, whether the delivery of the endorsed acceptances constituted under the contracts payments of the purchase price which extinguished the lien.

1. As to the first of these questions it is necessary to consider the provisions of the Maritime Lien Act of 1910,[1] relating to liens for necessaries, which were reenacted in the Ship Mortgage Act of

[1] 36 Stat. 604, c. 373.

1920.[2] Subsec. P of the latter Act provides that: "Any person furnishing repairs, supplies . . . or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel." Subsec. S provides that: "Nothing in this section shall be construed to prevent the furnisher of repairs, supplies . . . or other necessaries . . . from waiving his right to a lien . . . at any time, by agreement or otherwise. . . ."[3]

Prior to the Act of 1910 it had been settled that by the maritime law as administered in this country a lien was given for necessaries furnished a vessel in a port of a foreign country or state upon the credit of such vessel; but that no such lien was given for necessaries furnished in the home port or state. *The Roanoke*, 189 U. S. 185, 193.

The purpose of the Act of 1910, as shown by the Reports of the Committees of Congress, was to do away with this "artificial distinction" and "the doctrine that, when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely upon the credit of the vessel, and that hence, no lien arises"; and "to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and necessaries". *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 11.

To this end the Act gave a maritime lien on any vessel, whether foreign or domestic, for necessaries furnished on the order of the owner or his authorized agent, and relieved the libellant from the necessity of alleging or proving that credit was given to the vessel. The Committee reports show, however, that it was not intended to make any other change in the general principles of the existing law of maritime liens, *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, *supra*, p. 11; and the specific provision that the Act should not be construed as preventing the furnisher of the necessaries from waiving his right to a lien, "by agreement or otherwise,"

[2]This is the separate designation of sec. 30 of the Merchant Marine Act of 1920, 41 Stat. 988, 1000, c. 250.

[3]U. S. C., Tit. 46, §§ 971, 974.

indicates clearly, we think, that it was not intended to change the principles of the maritime law in respect thereto. That an express renunciation of the lien is not essential, is plain.

We need not enter here into the general field of the waiver of maritime liens. Such liens differ in their character and are not equally favored—the lien for necessaries, which is a secret one, being *stricti juris*, *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, *supra*, 12. It suffices to say that we think the principles applicable to the question whether the lien was waived by the contracts entered into here, are aptly indicated in the following cases, which, in the main, were analogous in their facts to the present case, and were decided by members of this Court, sitting at circuit.

In *Murray* v. *Lazarus*, 1 Paine 572, 17 Fed. Cas. 1049, 1051 (1826), the libellants made a special agreement with the master for the payment of their advances for repairs and supplies furnished the vessel in a foreign port, and took from him a bill of exchange drawn upon the agents of the owner. Thompson, Circuit Justice, in holding that the libellants had no lien for these advances on the freight monies received by the owners, said: "When an express contract has been entered into for the payment of such expenses, that must be resorted to, and will be considered a waiver of such implied lien if any existed. And a party who has waived his right in this respect cannot be permitted, at a subsequent time, and under a change of circumstances to reinstate himself in his former condition to the injury of others . . . If this is to be considered a regular and ordinary bill of exchange, it was a substitution for any lien that might have existed, and must be considered a relinquishment thereof."

In *Phelps* v. *The Comilla*, Taney, 400, 19 Fed. Cas. 441, 445 (1838), the libellants furnished the agents of the vessel in a foreign port copper which was used in repairing the vessel. The sale was made on a written order of the agents that made no mention of the vessel or her owners. The copper was charged to the agents, and they gave the libellants their negotiable note, which was not paid. The libellants claimed that the charge to the agents had been made by mistake, and some months later changed the account on their books and charged the copper to the ship and her owners. Taney, Circuit Justice, finding upon the evidence that the copper was sold to the agents upon their personal credit and was

not furnished upon the credit of the brig and her owners, held that the libellants had no lien, but added: "It must not, however, be understood, that the decision would be different, if the copper had been originally charged to The Camilla and her owners. It is true, that upon such a sale, the libellants would, in the first instance, have acquired a lien upon the brig; but that lien, in my opinion, would have been waived by taking afterwards the note of (the agents). . . . If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue."

In *Leland* v. *Medora*, 2 Woodb. & M. 92, 15 Fed. Cas. 298, 299 (1846), Woodbury, Circuit Justice, speaking of the lien for repairs on a vessel, said that "if the evidence . . . shows, that the ship was not relied on originally, though foreign, but the master or owners or other security were, the lien does not attach any where, or under any form. The Maitland, 2 Hagg. Adm. 253; The Nestor [supra.]"

In *The Ann C. Pratt*, 1 Curt. 340, 1 Fed. Cas. 947, 950 (1853), Curtis, Circuit Justice, in holding that there was no maritime lien for advances to the master of the vessel in a foreign port to make necessary repairs that had been secured by a void bottomry bond, said, citing *The Nestor* and other cases, "that the lien created by the maritime law may be, and is, waived by the creditor, by any act or contract which is inconsistent with an intention to receive or retain that lien." The decree in this case was affirmed in *Carrington* v. *Pratt*, 18 How. 63, 68, in which this Court said that "it is well settled that the lien implied by the general admiralty law, may be waived by the express contract of the parties, or by necessary implication; and the implication arises in all cases where the express contract is inconsistent with an intention to rely upon the lien. A familiar instance is where the money is advanced or repairs made, looking solely to the personal responsibility of the owner or master."

In *Taylor* v. *The Commonwealth*, 23 Fed. Cas. 756, 757 (1875), the libellant, before making repairs on the vessel at her home port, had entered into a written contract specifying that they were to be paid for partly in cash and partly in endorsed notes, that is, negotiable notes, with personal security. Miller, Circuit Justice, in holding that under these circumstances there was no lien on the vessel for the repairs, said: "I have no doubt of the fact that a man doing that kind of work may rely on the owner of the vessel, and that if he makes no specific contract on the subject, he will have a right against the owner and the vessel . . . ; but that is a lien which the law implies from the circumstances, and if a specific contract is made which shows that the party relied upon other security and other modes of payment, then he cannot enforce the admiralty lien. It is very clear to me, here, that (the libellant) in making this contract, never intended to rely on the security of the vessel itself, because he made this contract for the very best kind of other payment. . . . I think, having made an express contract for an express security, he cannot say, 'I did this work on the credit of the vessel.' In other words, I think if there is any question of admiralty lien, that it must have been the intention in the mind of the party who furnishes the supplies and repairs whether in a home or foreign port, to rely on the credit of the vessel. . . . If it can be shown that he did not rely on that alone, and that he intended to rely on other security, which he supposed sufficient, or which was supposed to be better, then he had no lien, because the lien arises from implication, from the fact expressed or implied that the man in furnishing the supplies or contracting a debt, relied on the vessel as security, and if he relied on anything else it is another security sufficient, or supposed to be, which, in case that turned out to be insufficient, does not restore his lien."

In the present case the libellant, being unwilling to sell the coal to the owner for the use of the vessel without personal security for the payment of the purchase price, before furnishing the coal made contracts which specifically provided that the owner should "pay for" the coal at the time of its delivery by trade acceptances endorsed by three designated persons, who in consideration for the contracts agreed to endorse the acceptances. Neither of the contracts provided for any lien upon the vessel;

and each, on the contrary, specifically recited that it stated the entire contract between the parties and that there was no outside agreement or understanding. Furthermore, upon the delivery of the coal, the libellant accepted the trade acceptances endorsed by the designated persons, and when it filed the libel against the vessel still retained the unpaid acceptance, on which later it brought suit against the endorsers.

Applying the principles stated in the foregoing cases, we think that the libellant, having made specific contracts for an express security, instead of resting on the lien which the law would otherwise give, must rely on the contracts it made for itself, and cannot now, in a change of circumstances, resort to the lien it would have had in the absence of the special agreements; and that by taking other and different security, upon which it relied, and which it still retains, without stipulating for the retention of the lien, it has waived the lien which it otherwise would have had.

2. Holding that the lien was waived, it becomes unnecessary to determine whether the deliveries of the endorsed acceptances constituted under the contracts payments of the purchase price which would have extinguished the lien.

The decree is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.